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Supreme Court of the United States

DOCKET NO. 154

No. 89

SCRIPTO, INC., ETC., APPELLANT,

vs.



**DALE GARDNER, AS CUSTODIAL OF DOVAN, ET AL.,
ET AL., ET AL.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**PRINTED IN U.S.A.
FREDERIC JONES, INC., NEW YORK CITY, N.Y.**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

No. 80

SCRIPTO, INC., ETC., APPELLANT,

vs.

DALE CARSON, AS SHERIFF OF DUVAL COUNTY,
FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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[fol. 21]

{File endorsement omitted}]

**IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA
IN CHANCERY NO. 95915-E**

DIVISION E

**SCRIPTO, INC., a corporation organized and existing under
the laws of the State of Georgia, Plaintiff,**

—vs—

**AL CAHILL, as Sheriff of Duval County, Florida, and RAY E.
GREEN, as Comptroller of the State of Florida, Defendants.**

BILL OF COMPLAINT—Filed July 11, 1957

The plaintiff, Scripto, Inc., by its undersigned attorneys, brings this its bill of complaint against Al Cahill, as Sheriff of Duval County, Florida, and Ray E. Green, as Comptroller of the State of Florida, and alleges:

I.

The plaintiff, Scripto, Inc., is a business corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia.

II.

The defendant, Ray E. Green, is the duly elected Comptroller of the State of Florida and, under the provisions of Chapter 212, F. S. 1951, is the officer of this State charged with the duty of assessment and collection of all Sales and Use Taxes imposed by Chapter 212, F. S., known as "the Florida Revenue Act of 1949". The defendant, Al Cahill, is the duly elected and constituted Sheriff of Duval County, Florida and as such is the officer charged with the duty of executing any warrants issued by the defendant Ray E. Green for the purpose of enforcing collection of the aforementioned taxes in the said county.

The defendant Green, as Comptroller of the State of Florida, has assessed against the plaintiff a sales and use tax under the foregoing statute and has issued a distress warrant, and the defendant Cahill, as Sheriff of Duval County, Florida, is now in the process of executing the same. The plaintiff contends that such assessment, distress warrant and threatened execution thereon are illegal and invalid, and should be enjoined by reason of the facts hereinafter stated.

The plaintiff Scripto, Inc. manufactures at its plant in Atlanta, Georgia mechanical writing instruments which it sells to independent jobbers throughout the United States, including the State of Florida. Since November 1, 1953, and prior to that time, Scripto, Inc. has employed a salesman who resides in Jacksonville, Florida, and who covers the entire State of Florida soliciting orders on behalf of Scripto, Inc. from such jobbers. The sole authority of this salesman is to solicit orders of the regular Scripto line for sale to jobbers, and to forward such orders to the home office of Scripto in Atlanta, Georgia. This salesman has no authority to accept or reject orders, to approve credits or to make collections. The orders which the salesman receives and transmits to Atlanta are reviewed by the company for the purposes, among others, of determining the availability of items ordered and approval of credit, and if the order is accepted, the order is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the jobber in Florida. All of said sales are sales for resale in Florida, since the writing instruments purchased by the jobbers are resold by them to various retail stores which in turn sell to the ultimate consumer. Scripto, Inc. does not own, lease or maintain in the State of Florida any office, distributing house, sales room, warehouse or other place of business. It does not maintain in the State of Florida any bank account, any stock of merchandise or any other property.

V.

In connection with the sales described in the preceding paragraph, Scripto, Inc. distributes, free of charge, to such jobbers metal merchandising displays which contain the mechanical writing instruments sold to the jobber, and which also serve to display the instruments on the counter of the retailer. Scripto, Inc. makes no charge for such display containers, and they, like the writing instruments contained in them, are not used or consumed by the jobber, but are redistributed by him to various retail stores in the State of Florida.

VI.

Adgif Company is a division of Scripto, Inc., and also has its principal office and place of business in Atlanta, Georgia, but such office is in a different location from that of Scripto, Inc., and Adgif is operated as a separate and distinct company. Adgif is in the business of selling mechanical writing instruments with advertising matter printed thereon. Customers of Adgif do not resell such writing instruments, but distribute the same, free of charge, as a means of advertising their respective businesses. The method and means of distribution of Adgif products is separate and distinct from the distribution system of Scripto, Inc., alleged in Paragraph IV above. The regular Scripto salesman employed in Florida does not solicit orders for Adgif products; nor does he in any way aid, assist or have any connection whatsoever with Adgif sales or distribution. Adgif employs no salesmen; orders for Adgif products are so [fol. 5] solicited by independent manufacturers, representatives, jobbers and commissioned merchants in the State of Florida. Such merchants are not in any sense employees or agents of either Adgif or Scripto, Inc., nor are they in any way controlled or directed by either Adgif or Scripto, Inc. Orders for Adgif products solicited by such merchants are sent directly to the home office of Adgif in Atlanta for acceptance or refusal, and if accepted, the independent merchant is paid an agreed commission by Adgif, and the sale is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the

Florida purchaser. Payment is made by the buyer directly to Adgif Company in Atlanta, and such independent merchants have no authority to accept an order, accept payment for an order, to make deliveries, or to make collections of accounts. Adgif purchases from Scripto, Inc. the mechanical writing instruments which Adgif distributes in this manner. Adgif Company does not own, lease or maintain in the State of Florida any office, distributing house, sales room, warehouse or other place of business. It does not maintain in the State of Florida any bank account, any stock of merchandise or any other property.

VII.

That on December 2, 1955 Scripto, Inc. received a notification from F. G. Merrin, Assistant Director, Use Tax Division, Comptroller's Office, State of Florida, demanding that Scripto register as an out-of-state dealer under F.S.A. Section 212.05 and requesting a schedule of all advertising materials and equipment which Scripto, Inc. had sent into Florida since November 1, 1953.

VIII.

That on February 9, 1956 the plaintiff, through its attorney, Mr. George B. Haley, Jr. of Atlanta, Georgia, in [fol. 6] informed the defendant, Ray E. Green, that in their opinion, Scripto was not subject to the jurisdiction of the State of Florida so as to be required to register as a dealer under the provisions of F.S.A. Section 212.05. Subsequent to the said date, several conferences were held between the plaintiff through its authorized representatives and J. N. Ayeocke, Director of the Use Tax Division, Comptroller's Office, State of Florida, representative of the defendant, Ray E. Green. As a result of these conferences, the State Comptroller's Office has declared that the State of Florida has such jurisdiction over Scripto, Inc. as to require it lawfully to register as an out-of-state dealer as to the Adgif sales. Further, the authorized representative of the State Comptroller, Mr. Ayeocke, has ruled that the display stands which Scripto furnishes free of charge to its customers in the State of Florida are for use and consumption within the

meaning of Section 212.05(2) of the Florida Statutes and hence a use tax is due therefrom.

At these conferences, the plaintiff, through its authorized representative, took the position that Scripto, Inc. could not be lawfully required to register as an out-of-state dealer or to collect the use tax with respect to sales by Adgif Company to purchasers residing in Florida, since such sales do not result by reason of any business done by either Scripto, Inc. or Adgif Company in the State of Florida, and that to require Scripto, Inc. to register as a dealer and to collect the said use tax with respect to such sales would constitute an unreasonable burden upon interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States, and would deprive plaintiff of its property without due process of law, in violation of Amendment XIV of the Constitution of the United States, and Declaration of Rights, Section 12 of the Constitution of the State of Florida. At said conferences, plaintiff took the further position that any display containers which it had supplied to jobbers in the State of Florida are not subject to the Florida Use [fol. 7] Tax Act, Section 212.05(2), since the same are not sold by Scripto, Inc. and are not distributed by Scripto, Inc. for use or consumption in the State of Florida; and that even if such display containers be distributed by Scripto, Inc. for use or consumption in the State of Florida, the same are exempt from the Florida Use Tax Act as containers within the meaning of Section 212.02(3)(b) of that Act.

IX.

On November 9, 1956 at a conference between the duly authorized representatives of the plaintiff and the defendant Ray E. Green, the plaintiff was informed that it would be useless to further discuss the subject and that the Comptroller would assess against the plaintiff a use tax due upon the above noted transactions in accordance with Section 212 of the Florida Statutes.

X.

Thereupon, on July 8th, 1957, the Comptroller assessed against the said plaintiff, including Adgif Company, a divi-

sion of the plaintiff, a sales and use tax for the period ending December 3, 1956, in the principal amount of \$3,732.37, with interest in the amount of \$485.20, and penalties in the amount of \$933.09; aggregating in all \$5,150.66. Said aggregate assessment is based on sales and use taxes alleged by the Comptroller to be due for the years 1953, 1954, 1955 and 1956 with respect to all sales by Adgif Company in the State of Florida for that period, and with respect to display containers distributed by Scripto, Inc. to jobbers during that same period. The aggregate tax, interest and penalty claimed by the Comptroller to be due is broken down as follows:

	1953	1954	1955	1956	Interest	Penalty
Adgif Sales	\$783.98	\$966.23	\$1086.58	\$590.16	\$445.50	\$856.74
Display Containers ...	100.72	109.09	95.61	39.70		76.35

[fol. 8] On the 8th day of July, 1957, the said Comptroller issued a distress warrant in said aggregate amount of \$5,150.66 and delivered the same to the defendant Al Cahill, Sheriff of Duval County, Florida, and the said last named defendant is now in the process of executing the said distress warrant by garnishing accounts owed to the plaintiff by certain of its customers located in Duval County, Florida.

XI.

Plaintiff alleges that the said assessment with respect to the sales of Adgif Company is illegal and invalid for the following reasons:

(1) Scripto, Inc. is not required by the provisions of the Florida Sales and Use Tax Act, Chapt. 212, Florida Statutes, to register as an out-of-state dealer and collect the sales and use tax upon sales by Adgif Company, because such sales do not arise by reason of any business done by either Scripto, Inc. or Adgif Company in the State of Florida.

(2) If said Statute be construed to require Scripto, Inc. to register as an out-of-state dealer and to collect the sales and use tax upon sales of Adgif Company, it imposes an unreasonable burden upon interstate com-

mèree, in violation of Article I, Section 8 of the Constitution of the United States, and deprives the plaintiff of its property without due process of law, in violation of Amendment XIV of the Constitution of the United States and Declaration of Rights, Section 12, of the Constitution of the State of Florida, and the said Statute is, therefore, invalid.

XII.

Plaintiff alleges that the said assessment is illegal and invalid insofar as the same is based upon the cost of display [fol. 9] containers distributed by Scripto, Inc. to jobbers in the State of Florida for the reason that said display containers are distributed by Scripto, Inc. to jobbers in the State of Florida who in turn redistribute such display containers to retailers, and the distribution by Scripto, Inc. is not for use or consumption in the State of Florida within the meaning of Section 212.05(2) of the aforesaid statute; and for the further reason that said display containers are specifically exempt from the imposition of the Florida Sales and Use Tax by the terms of Section 212.02(3)(b) of the said statute,

XIII.

That unless defendants are enjoined from their attempted collection of the aforementioned invalid and illegal taxes, interest and penalties, plaintiff's property in Duval County, Florida will be levied upon and otherwise restrained, therefore unlawfully interfering with the plaintiff's property rights and rights under the Constitution and laws of the United States and the State of Florida and otherwise causing irreparable harm and injury to plaintiff for which there is no remedy at law.

Wherefore, plaintiff prays that this Court will declare and decree that the aforementioned assessment of taxes, penalties and interest against the plaintiff is illegal and invalid and that this Court will grant a temporary injunction pendente lite restraining and enjoining the defendants, their agents, servants, deputies and employees from collecting or attempting to collect the aforesaid taxes, penal-

ties and interest from plaintiff and enjoining and restraining them severally and their respective agents, servants, deputies and employees from levying upon, attaching, dis-[fol. 10] training selling plaintiff's property in Duval County to enforce said warrant, and that said temporary injunction may be made permanent upon final hearing herein.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George B. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.

Duly sworn to by Davisson F. Dunlap, jurat omitted in printing.

[fol. 11] [File endorsement omitted]

IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA
IN CHANCERY

[Title omitted]

ANSWER OF DEFENDANT, AL CAHILL, SHERIFF OF DUVAL
COUNTY, FLORIDA—Filed August 5, 1957

Comes now the Defendant, Al Cahill, Sheriff of Duval County, Florida, by his undersigned attorney, and in answer to the Complaint herein says:

1. Said Defendant admits that he is the Sheriff of Duval County, Florida, and as such is charged with the duty of executing any warrants issued by the Honorable Ray E. Green, Comptroller, for the purpose of collecting statutory taxes; and at the present time does have a distress warrant in his hands for execution upon assets of the Plaintiff, and will make such execution unless otherwise enjoined herein.

2. Defendant denies each and every other material fact contained in said Complaint, upon the grounds that he has no knowledge of the same.

S. Perry Penland, Attorney for Defendant, Al Cahill, Sheriff of Duval County, Florida, 703 Atlantic National Bank Bldg., Jacksonville 2, Florida.

I Hereby Certify that copy of the foregoing has been furnished Adair, Ulmer, Murchison, Kent & Ashby, Attys for Plaintiff, 1215 Barnett Bank Bldg., Jacksonville, Florida, by mail, this 1st day of August, 1957.

S. Perry Penland

[fol. 14] [File endorsement omitted]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY NO. 95915-E

DIVISION "E"

[Title omitted]

ANSWER—Filed September 3, 1957

The defendant, Ray E. Green, as Comptroller of the State of Florida, for his answer and other defenses to the Complaint herein says:

First Defense

That said Complaint fails to state a cause of action against this defendant.

Second Defense

1. That this defendant admits the allegations of Paragraph I of said Complaint.
2. That this defendant admits the allegations of Paragraph II of said Complaint.

3. That this defendant admits the allegations of Paragraph III of said Complaint.

4. That this defendant admits that the plaintiff manufactures, at its plant in Atlanta, Georgia, mechanical writing instruments which it sells in the State of Florida, and that plaintiff employs a salesman who resides in Jacksonville, Florida and who solicits orders on behalf of Scripto Inc. in the State of Florida; and this defendant further admits that shipments are made by the plaintiff from Atlanta, Georgia to the State of Florida for delivery to the purchaser of same in Florida, as alleged in Paragraph [fol 15] IV of said Complaint, but this defendant is without knowledge as to the truth of the other and further allegations contained in said Paragraph IV of said Complaint.

5. That this defendant admits that the plaintiff distributes to its customers in Florida, certain merchandising displays as alleged in Paragraph V of said Complaint; and in connection with such allegation as contained in said Paragraph V of said Complaint, this defendant says that said merchandising displays are for use and consumption within the State of Florida, within the intent and meaning of the provisions of Section 212.05(2), Florida Statutes; but this defendant is without knowledge as to the truth of the other and further allegations contained in said Complaint.

6. That this defendant admits that "Adgif" is in the business of selling mechanical writing instruments with advertising matter printed thereon, and that "Adgif" ships such writing instruments to persons in Florida who purchase such merchandise sold by "Adgif," as alleged in Paragraph VI of said Complaint; and in this connection, this defendant further says that said merchandise so purchased by persons in the State of Florida and shipped to persons in the State of Florida by "Adgif" is for use and consumption in the State of Florida within the intent and meaning of Section 212.05(2), Florida Statutes; and in further connection with the allegations contained in said Complaint, this defendant says that "Adgif" is merely a trade name used

and employed by the plaintiff for the conduct of certain phases of the plaintiff's business, and that the plaintiff, itself, is engaged in the business described in said Paragraph VI of said Complaint as the business of "Adgif"; and this defendant is without knowledge as to the truth of the other matters and things alleged in said Paragraph VI of said Complaint.

7. That this defendant admits the allegations of Paragraph VII of said Complaint, except that this defendant is without knowledge as to the exact date the plaintiff received the notification from the authorized representative of this defendant as alleged in said Paragraph VII of said Complaint.

8. That this defendant admits that it has been and is plaintiff's contention that the plaintiff contends and has contended that it is not required to register as a "dealer" [fol. 16] under the provisions of Chapter 212, Florida Statutes, and that this defendant contends and has contended that plaintiff is required to register as such "dealer"; and that plaintiff is further required to collect the use tax on merchandise shipped into the State of Florida for use and consumption therein; and that plaintiff has refused to register as such "dealer" and to collect said use tax, and continues to so refuse as alleged in said Paragraph VIII of said Complaint.

9. That this defendant admits the allegations of Paragraph IX of said Complaint, but in connection with the allegations of said Paragraph IX of said Complaint, this defendant further says that this defendant determined that it was useless to further discuss with plaintiff's representatives the matter of registration and collection of said use tax under the provisions of Chapter 212, Florida Statutes in that plaintiff continued to fail and refused to register as a "dealer" and collect said use tax under the provisions of Chapter 212 Florida Statutes.

10. That this defendant admits the allegations of Paragraph X of said Complaint.

11. That this defendant admits that plaintiff alleges that the assessment for use tax, penalties and interest is

invalid, as alleged by plaintiff in Paragraph XI of said Complaint, but this defendant denies that said assessment is invalid as alleged by plaintiff in said Paragraph XI of said Complaint, and in this connection, this defendant says that the assessment by this defendant against the plaintiff for the use tax described in said Complaint, and the requirement of the said Chapter 212, Florida Statutes that plaintiff register as a "dealer" and collect use tax on merchandise shipped by plaintiff into the State of Florida, for use and consumption within the State of Florida, is a valid exercise of the taxing authority of the State of Florida.

12. That this defendant denies that the assessment by this defendant against the plaintiff for use tax tax (sic) based on the cost of display containers shipped by plaintiff [fol. 17] into the State of Florida for use and consumption within the state of Florida is invalid as alleged in Paragraph XII of said Complaint, and, this defendant further denies that said display containers are specifically exempt from the imposition of said use tax by the terms of Section 212.02(3)(b), Florida Statutes, as alleged in said Paragraph XII of said Complaint, and in this connection, this defendant further says that the assessment by this defendant against the plaintiff of use tax upon the cost of said display containers is a valid exercise of the taxing power of the State of Florida.

13. That this defendant denies the allegations of Paragraph XIII of said Complaint, except in connection with the allegations contained in said Paragraph 13 of said Complaint, this defendant says that upon this Court determining that the plaintiff is validly subject to the said provisions of said Chapter 212, Florida Statutes, that it will call upon the defendant, Sheriff of Duval County, Florida, to levy on any property of the plaintiff found within said Duval County, Florida, for the payment of said tax assessment.

Third Defense

That this defendant denies each and every the allegations contained in said Complaint, except those matters expressly admitted in this defendant's foregoing Second Defense.

Barnes, Barnes, Naughton & Slater, Thomas W. Barnes, 812 Greenleaf Building, Jacksonville, Florida, Attorneys for Defendant, Ray E. Green, as Comptroller of the State of Florida.

Certificate of Service (omitted in printing).

[fol. 18] [File endorsement omitted]

In THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY

[Title omitted]

STIPULATION OF FACTS—Filed October 1, 1957

The parties to the above stated case do hereby stipulate and agree that the said case may be tried upon the following facts without further proof thereof:

1.

The plaintiff, Scripto, Inc., is a business corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia and has not qualified as a foreign corporation to do business in the State of Florida.

2.

The defendant, Ray E. Green, is the duly elected Comptroller of the State of Florida and, under the provisions of Chapter 212, F.S. 1951, is the officer of this State charged with the duty of assessment and collection of all Sales and Use Taxes imposed by Chapter 212, F.S., known as "the Florida Revenue Act of 1949". That the defendant, Al Cahill, is the duly elected and constituted Sheriff of Duval County, Florida, and as such is the officer charged with the [fol. 19] duty of executing any warrants issued by the defendant Ray E. Green for the purpose of enforcing collection of the aforementioned taxes in the said county.

3.

The defendant Green, as Comptroller of the State of Florida, has assessed against the plaintiff a use tax under

the foregoing statute and has issued a distress warrant, and the defendant Cahill, as Sheriff of Duval County, Florida, is now in the process of executing the same.

4.

The plaintiff Scripto, Inc. manufactures at its plant in Atlanta, Georgia, mechanical writing instruments which it sells to independent jobbers throughout the United States, including the State of Florida. There are approximately 150 such jobbers in the State of Florida who regularly purchase from Scripto. Some of these jobbers ship part of such Scripto merchandise to retailers without the State of Florida for ultimate retail sale or ultimate use or consumption. The matters and things hereinafter described, however, refer only to sales, use and consumption of such Scripto merchandise within the State of Florida. Since November 1, 1953, and prior to that time, Scripto, Inc. has employed a salesman who resides in Jacksonville, Florida, and who covers the entire State of Florida soliciting orders on behalf of Scripto, Inc. from such jobbers. The sole authority of this salesman is to solicit orders of the regular Scripto line for sale to jobbers, and to forward such orders to the home office of Scripto in Atlanta, Georgia. A sample copy of the order form on which all such orders are taken is attached hereto as Exhibit "A" and made a part hereof. This salesman has no authority to accept or reject orders, to approve credits or to make collections. The orders which [fol. 20] the salesman receives and (sic) transmits to Atlanta are reviewed by the company for the purposes, among others, of determining the availability of items ordered and approval of credit, and if the order is accepted, the order is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the jobber in Florida.

All of said sales are sales for resale in Florida, since the writing instruments purchased by the jobbers are resold by them to various retail stores, which in turn sell to the ultimate consumer. Scripto, Inc. does not have any other employee in the State of Florida and does not own, lease, or maintain in the State of Florida any office, distributing house, salesroom, warehouse, or other place of business.

It does not own or maintain in the State of Florida any bank account, any stock of merchandise or any other property.

5.

In connection with the sales described in the preceding paragraph, Scripto, Inc. distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobber and which also serve to display the writing instruments on the counter of the retailer. No separate charge is made by Scripto to the jobber for such display containers. A sample circular issued by Scripto, picturing the several types of such display containers and showing that no separate charge is made for the container, is attached hereto as Exhibit "B" and made a part hereof. Such display containers, like the writing instruments contained in them, are not used or consumed by the jobber but are redistributed by him with the contents intact to various retail stores in the State of Florida, where such containers are used by the retail stores to display the merchandise and replacement merchandise ordered by the retailer. A jobber pays to Scripto the same price for the [fol. 21] same quantity of writing instruments whether or not such writing instruments are delivered in a display container. Scripto, Inc. does not retain title to such display containers nor does it require that either the jobbers or the retail dealers return such containers to Scripto.

6.

Adgif Company is a Division or Department of Scripto, Inc. It is not a separate corporation, but is wholly owned by Scripto, Inc., and that part of the business of Scripto which is hereinafter described, is operated by Scripto under the name of Adgif Company. Adgif has its principal office and place of business in Atlanta, Georgia, and although such office is in a different location than that of Scripto, Inc., being across the street from the Scripto office, orders received by Adgif by mail are directed to the same Post Office Box as orders by mail are directed to Scripto, Inc.

Adgif is in the business of selling mechanical writing instruments with advertising material printed thereon.

Such mechanical writing instruments are obtained by Adgif from Scripto, and the manufacturer's costs for such writing instruments are charged on the books of Scripto to that part of Scripto's business operated by or under the name of Adgif Company. Customers who purchase writing instruments from Adgif do not resell such instruments, but distribute same free of charge as a means of advertising their respective businesses.

7.

The method and means of distribution of Adgif products is separate and distinct from the distribution system of Scripto, Inc. which is set out in paragraph "4" above. The regular Scripto salesman employed in Florida does not solicit orders for Adgif products, nor does he in any way [fol. 22] aid, assist or have any connection whatsoever with Adgif sales or distribution. Adgif employs no salesman in the State of Florida. Orders for Adgif products are solicited by independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida, and such solicitors are furnished catalogs, order forms, samples, sample case and advertising material by Adgif to assist them in solicitation of orders. At the present time there are ten such independent merchants who solicit orders for Adgif products. A copy of the Contract which Scripto has with each of such merchants is attached hereto as Exhibit "C" and made a part hereof. Orders for Adgif products solicited by such merchants are sent directly to the home office of Adgif in Atlanta for acceptance or refusal and if accepted, payment therefor is normally made by customer directly to Adgif on such terms and in such manner as agreed upon by the customer and Adgif Company. The independent merchant is paid an agreed commission by Adgif and the sale is consummated by shipment in interstate commerce, f.o.b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the Florida purchaser. Under the Memorandum of Agreement between Adgif Company and independent manufacturers' representatives, jobbers and commissioned merchants, who solicit orders for Adgif products (see Exhibit "C" attached hereto) it is contemplated that

the orders taken shall be accepted by Adgif in Atlanta, Georgia, and the company reserves the right to reject any and all orders. However, if such jobber, commissioned merchant or independent manufacturers' representative obtains from the customer a check made out to the order of Adgif along with the Order, such check is forwarded with the order to Adgif in Atlanta. Copies of the order forms which such independent merchants use in taking orders are attached hereto as Exhibit "D" and Exhibit "D-1" (Exhibit [fol. 23] "D-1" being part of an Adgif catalog) and made a part hereof. Among the terms and conditions of said order is the provision the "State and Federal taxes, where applicable, are to be paid by the purchaser." Adgif Company does not own, lease or maintain in the State of Florida any office, distributing house, sales room, warehouse, or other place of business. It does not own or maintain in the State of Florida any bank account, any stock of merchandise, or any other property.

8.

Adgif Company receives no orders for its products from consumers in the State of Florida by reason of the solicitation by the aforesaid Scripto employee who resides in Florida and who solicits orders for Scripto products, but Adgif receives orders for its products solely by reason of the solicitation activity of the aforesaid independent merchants.

9.

On December 2, 1955 the defendant Comptroller demanded that Scripto register as an out-of-state dealer under F.S.A. Section 212.05, but Scripto has refused to register.

10.

The Comptroller has assessed against the said plaintiff, including Adgif Company, under the provisions of Chapter 212 Florida Statutes, a use tax for the period ending December 3, 1956, in the principal amount of \$3,732.37, with interest in the amount of \$485.20, and penalties in the amount of \$933.09, aggregating in all \$5,150.66. Said aggregate assessment is based on use taxes alleged by the Comptroller to be due for the years 1953, 1954, 1955 and

1956, for the use and consumption in the State of Florida of said mechanical writing instruments sold by Adgif to its customers in the State of Florida, and for the use and [fol. 24.] consumption of said metal display containers distributed by Scripto to jobbers in the State of Florida, who in turn distribute same to retailers for use by the retailers in displaying merchandise purchased by said retailers and contained therein at the time of distribution, and for such replacement merchandise as the said retailer might thereafter purchase from Scripto, Inc. The aggregate tax, interest and penalty claimed by the Comptroller to be due is broken down as follows:

	<u>1953</u>	<u>1954</u>	<u>1955</u>	<u>1956</u>	<u>Interest</u>	<u>Penalty</u>
Adgif Sales	\$783.98	\$966.23	\$1086.58	\$590.16	\$445.50	\$856.74
Display Containers		100.72	109.09	95.61	39.70	76.35

On the 8th day of June, 1957, the said Comptroller issued a distress warrant in said aggregate amount of \$5,150.66 and delivered the same to the defendant Al Cahill, Sheriff of Duval County, Florida, and the said last named defendant is now in the process of executing the said distress warrant.

In Witness Whereof, the aforesaid parties, through their attorneys, have executed this Stipulation this 30th day of September 1957.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George B. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.

Thomas W. Barnes, Barnes, Barnes, Naughton & Slater, 812 Greenleaf Building, Jacksonville, Florida, Attorneys for Defendant, Ray E. Green, as Comptroller for the State of Florida.

S. Perry Penland, 700 Atlantic Bank Bldg., Jacksonville, Florida, Attorney for Defendant, Al Cahill, as Sheriff of Duval County.

MEMORANDUM OF AGREEMENT

DATE

THE ADGIF COMPANY (a division of Scripto, Inc.), of Atlanta, Georgia, agrees, subject to the conditions herein, to pay to

for orders taken by

in the following territory:

and accepted by ADGIF COMPANY at its offices in Atlanta, Georgia, commissions as follows:

RATES OF COMMISSION

The rates of commission payable on orders accepted by Adgif Company will be as shown on "Schedule of Commissions" in effect at the time of acceptance of order by Adgif Company. Adgif Company reserves the right to revise or change its "Schedule of Commissions" at any time and from time to time.

PAYMENT OF COMMISSION

Orders cannot be accepted and commission paid until all necessary specifications are received. On orders giving complete specifications the full commission is payable when the order is accepted by Adgif Company.

On orders accepted by Adgif Company under a blanket contract the commission is paid on each quantity as ordered out.

On orders accepted by Adgif Company the commission is paid on the quantity ordered, not on the quantity actually shipped.

Commission checks are mailed twice each week.

PROTECTION: Commissions on repeat orders from the above territory, sent to Adgif within fifteen months from date of the last order will be credited to the salesman whose name is typed herein, provided he solicited and took the last order accepted by Adgif Company from such customer, and provided he is not "inactive" at the time such repeat order is received by Adgif Company at its office in Atlanta, Georgia. The party whose name is typed herein automatically becomes "inactive" when he has not submitted for 60 days any orders accepted by Adgif Company, and protection on his account is then withdrawn.

THE ADGIF COMPANY reserves the right to reject any and all orders. The party whose name is typed herein has no authority to and shall not make collections or incur any debts involving Adgif Company. Nor shall he represent or hold himself out as an employee or agent of Adgif Company, it being the intention of the parties hereto to create the relationship on the part of the party whose name is typed herein of independent contractor.

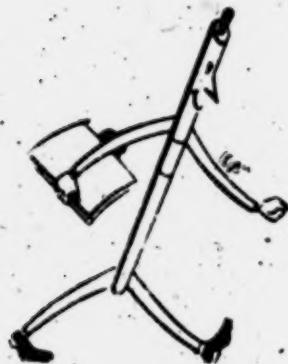
This agreement may be terminated by either party, depositing in the U.S. Mail a notice of intention to terminate, properly stamped and addressed to the other party at his or its last known address.

The terms and conditions herein are satisfactory and the undersigned hereby agrees to be bound thereby.

Salesman

ADGIF COMPANY

Street



ORIGINAL
ADGIF COMPANY
A DIVISION OF

Scripto

P. O. BOX 4847 ATLANTA 2, GA

DATE OF ORDER	CUSTOMERS ORDER NO.	SHIP FROM FACTORY ABOUT	PREV. ORDER NO.		
S PRINT FIRM O NAME L STREET D T CITY & O STATE	S PRINT FIRM H NAME I STREET P T CITY & O STATE	(TO BE FILLED IN IF OTHER THAN "SOLD TO" ADDRESS)	BILLING CLERK		
QUANTITY	CATALOG NUMBER*	DESCRIPTION	PRODUCT COLOR	UNIT PRICE	TOTAL AMOUNT
SPECIFY HERE COLOR CAP & POINT, OR TOP, IF APPLICABLE					TOTAL

**SPECIFY HERE COLOR CAP &
POINT, OR TOP, IF APPLICABLE**

TOTAL

SPECIFICATIONS FOR PRINTING (PLEASE PRINT LEGIBLY)
IF COPY SAME AS PREVIOUS ORDER—GIVE ORDER NUMBER OR DATE OF ORDER

COLOR OF EACH
LINE OF COPY

SPECIAL INSTRUCTIONS

1ST LINE

2ND LINE

3RD LINE

SPECIFICATIONS FOR PRINTING (PLEASE PRINT LEGIBLY)
IF COPY SAME AS PREVIOUS ORDER—GIVE ORDER NUMBER OR DATE OF ORDER

COLOR OF EACH
LINE OF COPY

1ST LINE		
2ND LINE		
3RD LINE		
4TH LINE		
5TH LINE		
6TH LINE		
7TH LINE		
8TH LINE		

TERMS: Net cash 30 days. When full cash accompanies order, or half cash with order and we ship C. O. D. for the balance a 2% discount is given. Make all checks payable to ADGIF COMPANY. All shipments F. O. B. Atlanta, Georgia. As it is almost impossible to imprint an exact quantity, we reserve the right to ship an underrun or overrun not to exceed 5% of the quantity ordered at pro-rated price.

ALSO SUBJECT TO CONDITIONS SHOWN ON REVERSE SIDE.

COPY AND ORDER APPROVED

PURCHASER _____

SIGNED BY _____

SALESMAN _____

SLM. ADDRESS _____

H. GARFIELD—ATLANTA—30437

Litho in U.S.A.

SPECIAL INSTRUCTIONS

CREDIT INFORMATION

(1) CUSTOMER HAS BOUGHT FROM ADGIF WITHIN
PAST TWO (2) YEARS: YES NO

UNDER WHAT NAME
IS CUSTOMER LISTED
WITH CREDIT AGENCIES:

CUSTOMER HAS BEEN IN BUSINESS SINCE _____

CUSTOMERS BANK _____

CITY & STATE _____

THIS ORDER IS MADE SUBJECT TO ACCEPTANCE BY THE ADGIF COMPANY AT ITS OFFICE IN ATLANTA, GEORGIA, AND IS NOT SUBJECT TO CANCELLATION OR CHANGES IN SPECIFICATIONS AFTER ACCEPTANCE.

IN THE ABSENCE OF DEFINITE SHIPPING INSTRUCTIONS, THE ADGIF COMPANY, MAY AT ITS SOLE DISCRETION, SHIP BY FREIGHT, EXPRESS, PARCEL POST, OR OTHER WAYS AND DELIVERY OF THIS MERCHANDISE TO THE CARRIER MAY BE CONSIDERED DELIVERY OF TITLE AND POSSESSION OF THE MATERIAL TO THE BUYER.

DELIVERY IS SUBJECT TO DELAY CAUSED BY FIRE, STRIKE, CIVIL OR MILITARY AUTHORITY, INSURRECTION OR RIOT OR OTHER CAUSES BEYOND THE CONTROL OF THIS COMPANY.

STATE AND FEDERAL TAXES, WHERE APPLICABLE, ARE TO BE PAID BY THE PURCHASER. INTEREST AT 6% WILL BE CHARGED ON PAST DUE ACCOUNTS.

THE SIZE, STYLE AND ARRANGEMENT OF TYPE ARE LEFT TO THE DISCRETION OF ADGIF COMPANY. PURCHASER WAIVES THE RIGHT OF REJECTION FOR SUCH CAUSE. CUSTOMERS SPECIFICATIONS ARE FOLLOWED AS CLOSELY AS PRACTICABLE.

THE PARTY SOLICITING AND TAKING THIS ORDER IS NOT AUTHORIZED TO COLLECT BILLS OR INCUR DEBTS FOR ANY PORTION OF THIS ACCOUNT.

THE ORDER HEREIN SHALL BE GOVERNED BY THIS WRITTEN AGREEMENT AND NO VERBAL UNDERSTANDING OR OTHER REPRESENTATION SHALL BE BINDING UPON THE PARTIES HERETO.

[fol. 93]

EXHIBIT "D-1" TO STIPULATION OF FACTS

(See Opposite) 

ADGIF COMPANY, Division of Scripto, Inc., P. O. Box 4847, Atlanta 2, Ga.

Date of Order	Customer's Order No.	Ship on or About	Cost of special Cut, Die or Artwork, if necessary	Do not write in this space	
Sold To:					
Street		City & State			
Quantity	Catalog Number	DESCRIPTION	Color	Unit Price	TOTAL AMOUNT

(Do not write)

TERMS: Net cash 30 days. When full cash accompanies order, or half cash with order and we ship C. O. D. for the balance, a 2% discount is given. State and Federal taxes, where applicable, are to be paid by the purchaser. All shipments F. O. B. Atlanta, Georgia. This order IS NOT SUBJECT TO CANCELLATION AFTER ACCEPTANCE. As it is almost impossible to print the exact amount, a shortage or excess not exceeding 5% shall be accepted at prorated prices.

**Specifications For Printing
(Please Type or Print)**

Line 1
Line 2
Line 3
Line 4
Line 5
Line 6
Line 7

Copy and order approved

Purchaser
Signed by

ORDER FORM

[fol. 94]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY NO. 95915-E

DIVISION "E"

SCRIPTO, Inc., a corporation organized and existing under
the laws of the State of Georgia, Plaintiff,

—vs—

AL CAHILL, as Sheriff of Duval County, Florida, and RAY E.
GREEN, as Comptroller of the State of Florida, Defendants.

FINAL DECREE—December 13, 1957

This cause came on for final hearing before the Court upon the pleadings, the Stipulation of Fact filed herein by the parties, and upon exhibits introduced into evidence pursuant to written stipulation of the parties; and the Court having heard argument of counsel, and being fully advised in the premises, finds as follows:

1. That the plaintiff, Scripto, Inc., a corporation, as to the metal merchandise display containers shipped into the State of Florida by the plaintiff, without cost, except for the cost of merchandise contained therein, to plaintiff's jobbers in the State of Florida, and redistributed by such jobbers to retailers to be used in the State of Florida, as described in Paragraph 5 of the said Stipulation of Fact, is not required by Chapter 212, Florida Statutes 1955, to collect any use tax that might be due on said metal merchandise display containers, and remit the same to the defendant, Ray E. Green, as Comptroller of the State of Florida.

[fol. 95] 2. That the plaintiff, Scripto, Inc., a corporation is a "dealer" within the intent and meaning of said Chapter 212, Florida Statutes 1955, as to orders solicited by independent manufacturer's representatives, jobbers and com-

missioned merchants in the State of Florida, for the sale of merchandise by the plaintiff, under the trade name of Adgif Company, upon such orders being accepted by the plaintiff in Atlanta, Georgia and shipped into the State of Florida by the plaintiff, for use or consumption therein, as described in said Stipulation of Fact; and the plaintiff is required by said Chapter 212, Florida Statutes 1955, to collect the 3% use tax on said merchandise so sold by the plaintiff for use and consumption in the State of Florida, and is liable to the State of Florida for the sum of \$4,729.19 for merchandise so shipped into the State of Florida for use therein according to Paragraph 10 of said Stipulation of Fact.

3. That the requirements of said Chapter 212, Florida Statutes 1955, that the plaintiff, as an out of state dealer, collect the use tax due the State of Florida for the use or consumption of merchandise sold by the plaintiff to Florida residents, for use and consumption as described in Paragraphs 6, 7 and 8 of said Stipulation of Fact, is a valid exercise of the taxing power of the State of Florida; is not an unreasonable burden upon interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States; and does not deprive the plaintiff of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and Section 12 of the Declaration of Rights of the Constitution of the State of Florida as contended by plaintiff.

It is, therefore, Ordered, Adjudged and Decreed:

(a) That the defendant, Ray E. Green, as Comptroller of the State of Florida, his agents, servants, deputies and employees be, and they are hereby permanently enjoined and restrained from collecting or attempting to collect from [fol. 96] the plaintiff, or requiring, or attempting to require the plaintiff, to collect any use tax that might be due the State of Florida, under the provisions of Chapter 212, Florida Statutes 1955, on account of the plaintiff delivering to jobbers in the State of Florida, metal advertising display containers, without cost, except for the cost of the writing instruments contained therein, which are redistrib-

uted by jobbers to retail merchants for their use within the State of Florida.

(b) That upon the plaintiff paying, or upon the defendant, Al Cahill, as Sheriff of Duval County, levying upon, attaching or distraining such of plaintiff's property as will be sufficient to pay the use tax due as described in Paragraph 2 of this decree, then the entire warrant now in the hands of the said defendant shall be deemed to be satisfied, discharged and of no further force and effect.

(c) That any and all other and further relief prayed for by plaintiff's Complaint herein; be, and the same is hereby denied.

Done and Ordered in Chambers at Jacksonville, Duval County, Florida, this 13th day of December, 1957.

Charles A. Luckie, Circuit Judge.

[fol. 97]

**IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA**

IN CHANCERY NO. 95915-E

DIVISION "E"

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF FLORIDA

—Entered February 7, 1958

The plaintiff, Scripto, Inc., a Georgia corporation, takes and enters its appeal to the Supreme Court of Florida to review paragraphs (b) and (c) of the Final Decree of the Circuit Court, Fourth Judicial Circuit of Florida, in and for Duval County, Florida, bearing date the 13th day of December, 1957 in the above styled cause and recorded in the records of said Court in Book 497, page 308. In said cause Al Cahill, as Sheriff of Duval County, Florida and Ray E. Green, as Comptroller of the State of Florida are

defendants; and all parties to said cause are called upon to take notice of the entry of this Appeal.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George E. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Appellant.

Done & entered this 7th day of February, 1958

Leonard W. Thomas, Clerk

By: J. Thomas, Dep. Clerk

[fol. 98] Certificate of service (omitted in printing).

[fol. 101]

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY, FLORIDA

IN CHANCERY NO. 95915-E

DIVISION "E"

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 17, 1958

The plaintiff assigns the following errors upon which it intends to rely in the Supreme Court of Florida for a reversal of a portion of the Final Decree appealed from.

1. The Court erred in making and entering paragraphs (b) and (c) of the Final Decree, bearing the date 13th day of December, 1957, and recorded in the records of the Court in Chancery Order Book 497, p. 308, et seq.

2. The Court erred in finding, in paragraph 2 of said Final Decree, that the plaintiff, Scripto, Inc., a corporation, is a "dealer" within the intent and meaning of Chapter 212, Florida Statutes 1955, as to orders solicited by independent manufacturers, representatives, jobbers and commission

merchants in the State of Florida for the sale of merchandise by the Adgif Company, a division of the plaintiff, and shipped into the State of Florida.

3. The Court erred in finding, in paragraph 2 of said Final Decree, that the plaintiff, Scripto, Inc., is required by Chapter 212 Florida Statutes 1955 to collect a 3% Use Tax on the merchandise sold by Adgif Company, a division [fol. 102] of the plaintiff, and shipped into the State of Florida.

4. The Court erred in finding in paragraph 2 of Final Decree that the plaintiff, Scripto, Inc. is liable to the State of Florida for the sum of Four Thousand Seven Hundred Twenty-nine Dollars and Nineteen Cents (\$4,729.19) on account of the three percent (3%) Use Tax due for merchandise shipped into the State of Florida by Adgif Company, a division of the plaintiff.

5. The Court erred in finding in the Final Decree that Chapter 212, Florida Statutes 1955, required the plaintiff as an out-of-state dealer to collect the Use Tax due the State of Florida for the sale of merchandise made by Adgif Company, a division of the plaintiff, and shipped into the State of Florida.

6. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by Adgif Company, a division of the plaintiff, to Florida residents, is a valid exercise of the taxing power of the State of Florida.

7. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents, is not an unreasonable burden upon interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

[fol. 103] 8. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents, do not deprive the plaintiff of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

9. The Court erred in finding in paragraph 3 of the Final Decree that the provisions of Chapter 212 Florida Statutes 1955, when adjudged to require the plaintiff, as an out-of-state dealer, to collect the Use Tax due the State of Florida for the use or consumption of merchandise sold by the Adgif Company, a division of the plaintiff, to Florida residents do not deprive the plaintiff of his property without due process of law in violation of Section 12 of the Declaration of Rights of the Constitution of the State of Florida.

10. The Court erred in not granting that portion of the plaintiff's Bill of Complaint which requested that Ray E. Green, as Comptroller of the State of Florida, and Al Cahill, as Sheriff of Duval County, Florida, be permanently enjoined from collecting any Sales or Use Taxes from the plaintiff alleged to be due the State of Florida under Chapter 212, Florida Statutes, because of the sales of merchandise by Adgif Company, a division of the plaintiff, and shipped into the State of Florida.

Davission F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida; George E. Haley, Jr. of Smith, Kilpatrick, Cody, Rogers & McClatchey, Hurt Building, Atlanta 3, Georgia, Attorneys for Plaintiff.

[fol. 104] Certificate of service (omitted in printing).

[fol. 106]

IN THE SUPREME COURT OF FLORIDA
JULY TERM A. D. 1958

Case No. 29,426

DUVAL COUNTY

SCRIPTO, Inc., a corporation organized and existing under the laws of the State of Georgia, Appellant,

vs.

DALE CARSON, as Sheriff of Duval County, Florida and RAY E. GREEN, as Comptroller of the State of Florida, Appellees.

An Appeal from the Circuit Court for Duval County, Edwin L. Jones, Judge.

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby and George B. Haley, Jr., of Smith, Kilpatrick, Cody, Rogers and McClatchey (Atlanta, Georgia); for Appellant.

Barnes, Barnes, Naughton & Slater, for Appellees.

OPINION—Filed October 17, 1958

Thornal, J.

Appellant Scripto, Inc., which was plaintiff below, seeks reversal of a final decree adjudging it to be responsible for the collection of a Florida use tax on certain personal property. Appellees Green and Carson, who were defendants below, by cross-assignment of error challenge the correctness of the same decree relieving appellant of the responsibility for collecting the use tax on another class of personal property.

[fol. 107] Numerous points are discussed but the major question on which our ultimate judgment turns is whether by the nature of its operation in Florida the appellant Scripto, Inc. has established such jurisdictional contacts as to subject it to certain provisions of Chapter 212, Florida Statutes, the Sales and Use Tax Act.

The problems presented to the Chancellor below and tendered for disposition here arose out of two separate and distinct types of transactions. Scripto, Inc. is a Georgia corporation with its principal place of business in Atlanta. It is not qualified to do business in Florida as a non-resident corporation. It manufactures in Georgia certain writing instruments. It sells these instruments to independent jobbers and wholesalers in Florida, who in turn sell them to retail stores. Scripto employs one Florida salesman who resides in Jacksonville. He solicits orders from the wholesalers primarily by personal contact. The authority of this salesman is to solicit the orders for sale to Florida wholesalers. He forwards the orders to Scripto in Atlanta where they are reviewed for various purposes. The orders are consummated (sic) by shipment via interstate commerce f.o.b. Atlanta by common carrier or post. By this means the writing instruments are delivered to the Florida wholesalers who in turn sell them to Florida retailers for retail sales to the ultimate consumer. Scripto maintains no distributing office or other business establishment in Florida. It has no bank account or stock of merchandise or other property in Florida except the accounts owed to it by the wholesalers. In connection with sales by Scripto to Florida wholesalers for ultimate sale at retail, Scripto distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobbers. These containers subsequently serve to display the writing instruments on the counters of the Florida retailers. No separate charge is made by Scripto for these metal display containers. The price of an assortment of mechanical writing instruments includes the display container "free". The containers are not used or consumed by the wholesaler but rather are redistributed by him, likewise without additional charge to the ultimate retailer. Scripto retains no title to the display containers nor does it in any fashion require either the wholesaler or the retail dealer to return such containers to it.

The foregoing is a summary of the factual situation which gave rise to one of the problems considered by the Chancellor. The appellee Green, as Comptroller, demanded that Scripto register as an out-of-state dealer under Section

212.06, Florida Statutes. He also demanded that Scripto collect and remit to him the three percent Florida use tax which he contended was due upon the metal display containers which Scripto furnished to the Florida wholesalers when the latter purchased an assortment of mechanical writing instruments for resale.

In order to avoid confusion we mention that we are not here concerned with any matter involving the collection of a Florida sales or use tax on these particular mechanical writing instruments. The sole question is whether under the circumstances above summarized Scripto would be required to register as a dealer and collect and remit the Florida use tax on the metal containers.

We next proceed to summarize the factual situation giving rise to the other problem considered by the Chancellor. It is this second situation which produces the major issue before us. As an entirely separate operation Scripto in Atlanta maintains a wholly owned and controlled division or department known as Adgif. Although for purposes of distinguishing the transaction which we now outline from [fol. 109] the one summarized above we refer to Adgif as such, it is in actuality merely Scripto, Inc. functioning through one of its own divisions. Adgif with its headquarters in Atlanta, Georgia, is in the business of selling mechanical writing instruments directly to Florida consumers. These instruments contain advertising lettering printed thereon. Adgif, of course, obtains the instruments from Scripto and ships them through interstate commerce direct to Florida customers. These customers do not purchase the writing instruments for resale but rather distribute them free of charge as a means of advertising their respective businesses. Adgif employs no salesman in Florida. The one Scripto salesman in Florida mentioned in the forepart of this opinion renders no service whatever to Adgif. He does not solicit business for them and makes no Florida contacts for them. Adgif products are solicited by some ten independent Florida brokers and commission merchants who sell the products of other manufacturers as well as those of Scripto, via Adgif. Orders for the Adgif products are solicited by these independent Florida jobbers and are mailed directly to the home office of Adgif in Atlanta.

for acceptance or refusal. If the order is accepted, payment therefor is made by the Florida customer directly to Adgif in Atlanta. In some instances the Florida jobber accepts a check from the customer but this check is also payable to Adgif and is forwarded with the order. The Florida independent jobbers are paid an agreed commission by Adgif for soliciting and obtaining the orders. Like its parent Scripto, Adgif maintains no salesroom or other business establishment in Florida. It has no Florida bank account or stock of merchandise or any other property in Florida except the accounts owed to it by its Florida customers. The "Adgif situation" resulted in the second problem considered by the Chancellor when the appellee Green demanded that Scripto register as an out-of-state dealer under Section [fol. 110] 212.06, Florida Statutes. He demanded that Scripto collect and remit to him the Florida use tax on the merchandise sold to Florida customers by Adgif pursuant to the orders taken for Adgif by Florida commission merchants.

The instant case arose when the appellee Comptroller assessed against Scripto a use tax liability in the amount of \$5,150.66, including interest and penalties for the years 1953 through 1956. Simultaneously with the assessment the appellee Comptroller issued a distress warrant in the stated amount and delivered the same to the appellee Sheriff of Duval County, Florida for execution against the property of the appellant Scripto. The appellant Scripto promptly filed its complaint in the circuit court seeking a decree of the Chancellor declaring the entire assessment illegal and praying for an injunction against the enforcement of the distress warrant. A stipulation between the parties was submitted to the Chancellor. This stipulation reflected agreement on the facts summarized above.

By his final decree the Chancellor concluded: (1) Scripto is not responsible for the collection and remission of the Florida use tax on the metal display containers in which the mechanical writing instruments were delivered to Florida wholesalers for ultimate delivery to Florida retailers, and (2) Scripto was liable as an out-of-state dealer to collect and remit the Florida use tax on the mechanical writing instruments sold to Florida customers by Adgif through

interstate commerce but pursuant to the solicitations and orders taken by Florida commission jobbers in behalf of Adgif.

Scripto has appealed from that aspect of the final decree imposing upon it the duty of collecting the use tax on the Adgif sales. The appellee Green, joined by the sheriff, has cross-assigned error from that part of the final decree holding Scripto not responsible for collecting the use tax on the metal display containers.

[fol. 111] Appellant Scripto here contends, as it did in the lower court, that it is not responsible for the collection and remission of the Florida use-tax on metal display containers because these containers are furnished to the Florida jobbers without charge; that the transaction constitutes a gift and not a purchase or else the sale is for resale in which the price of the display containers is included in the price of the assortment of writing instruments which it accompanies.

Scripto also contends that neither it nor its subsidiary Adgif is a "dealer" as to Adgif sales within the meaning of Section 212.06(2)(g), Florida Statutes, since in their view they do not solicit Adgif business by "representatives" in the State of Florida. They buttress this contention with the further proposition that if the cited Florida Statute should be construed as comprehending Scripto under the circumstances, then it violates Article I, Section 8 (the commerce clause) and the Fourteenth Amendment of the Constitution of the United States, as well as Section 12 of the Declaration of Rights of the Florida Constitution.

The appellees here contend that the Chancellor committed error in holding Scripto not liable for the collection and remission of the Florida use tax on the metal display containers and, of course, take the position that the Chancellor ruled correctly in imposing upon Scripto the use tax liability in connection with the Adgif transactions.

Reduced to its simplest terms the nub of the controversy on the first point is whether the transaction involving the metal containers constitutes a sale to a Florida consumer requiring the collecting of a use tax. As to the Adgif transactions, the principal point is whether Scripto has established in Florida jurisdictional contacts sufficient to sup-

port the exercise of the taxing power of the state and the [fol. 112] imposition of the requirement that Scripto function as the State's tax collector.

We point out for emphasis that we are not here concerned with the collection of the Florida *Sales Tax*. We should bear in mind that the instant case involves only an effort to collect the Florida *Use Tax*. There is, of course, a marked distinction between the two because of the nature of the imposts as well as the constitutional basis upon which the two types of taxes are grounded. A sales tax is a form of excise tax imposed on an ultimate consumer for the exercise of the privilege of purchasing property. The State's jurisdiction is supported by the proposition that the transaction takes place within the taxing forum. A use tax, which is the one here involved, is levied on the privilege of using, storing or consuming property purchased. The use tax was developed as a device to complement the sales tax in order to prevent evasion of the payment of the sales tax by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum. It also evolved as a protective measure for the benefit of retail merchants in the taxing state who would be placed at a competitive disadvantage as against shipments in interstate commerce from a non-taxing state. Obviously also the primary objective to be accomplished by these two complementary forms of taxation is to produce revenues for the operation of the government that protects the exercise of the privilege of making the purchase in one instance and of using, storing or consuming the property purchased in the other instance.

Use taxes generally have been upheld both in theory and in practice: *Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 Law ed. 814, 57 Sup. Ct. 524; *United States Gypsum Co. v. Green*, Florida 1958, opinion filed July 30, 1958, *Gaulden v. [fol. 113] Kirk*; Fla. 1950, 47 So. 2d 567; *Continental Supply Co. v. People*, 54 Wyo. 485, 88 P.2d 488, 129 ALR 217; *State Tax Commission v. General Trading Co.*, Iowa, 10 N.W.2d 659, 153 ALR 602.

We now devote our attention to the ruling of the Chancellor holding that Scripto, Inc. was not responsible as a dealer for the collection and remission of the Florida use

tax on the metal display containers which were delivered without any separate charge along with an assortment of mechanical writing instruments. The appellant, Scripto undertakes to support the ruling of the Chancellor by referring us to Section 212.06(1), Florida Statutes, which provides in part that the sales and use tax at the rate of "three per cent of the cost price, as of the moment of purchase, . . . shall be collectible from all dealers as herein defined . . ." Appellant points out that there must be a *purchase* by a Florida consumer before any dealer can be required to collect either the sales or use tax. In the absence of a *purchase* no tax is collectible. We are then reminded that the metal containers are delivered to the Florida wholesalers "free." There being no purchase by a Florida customer there can be no liability for the subject tax. We think the appellant properly points out that in order to justify the requirement of the collection of the use tax, there must be a purchase in the sense of acquiring title for a consideration.

Appellant offers an alternative argument which appears to us to be even stronger in support of the ruling of the Chancellor and one which more nearly comports with the logic and reason of the situation. By this argument it is pointed out that the display container furnished without separate charge is a part of the assortment offered for sale and that the cost of the container is in actuality included in the price of the assortment. When the tax is ultimately collected by the Florida retailer on the sale of the writing [fol. 114] instruments then he to that extent collects pro tanto the tax on the metal containers, the price of which has been included in the price paid for the writing instruments. Inasmuch as the tax, according to this argument, is actually collected by the retailer and remitted to the State in the form of a sales tax, the imposition of a use tax as urged by the appellee Comptroller would result in a duplication of the two taxes contrary to the provisions of Section 212.06(4), Florida Statutes.

Referring to the factual statement covering the metal containers it will be recalled that they were furnished by appellant Scripto to Florida wholesalers for resale to Florida merchants who in turn sold the writing instruments at

retail. In the view which we take of the instant matter; that is, that obviously the cost of the metal containers was included in the price paid for the merchandise assortment, then the composite assortment including writing instruments and the display container required by the Florida wholesaler from Scripto, Inc. was a purchase for resale within the definition of a "retail sale" under Section 212.02 (3)(a), Florida Statutes. Under these circumstances there would be no obligation on Scripto to collect and remit the use tax on the composite assortment as sold to the Florida wholesaler.

We, therefore, hold that the Chancellor ruled correctly in concluding that appellant Scripto was not obligated to register as a dealer and collect and remit the Florida use tax on the metal display containers.

The second major point involved in this appeal presents a more difficult problem. It will be recalled that in connection with the so-called Adgit transactions Scripto contends that inasmuch as it has no regular employees or business house, bank account or other property in Florida employed in effecting these sales to Florida consumers, [fol. 115] therefore, it has no obligation under the statute to qualify as a dealer and collect and remit the Florida Use Tax. Section 212.06(2)(g), Florida Statutes, contains one of the statutory definitions of a dealer within the contemplation of the sales and use tax law. The cited section reads as follows:

"'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this section from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this section may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this section have been fully complied with." (Emphasis added.)

Scripto advances the argument that it is not a dealer within the last quoted definition for the reason that in

connection with Adgif sales it is not represented by any employees in the State of Florida. It appears to be appellant's position that the Florida wholesale jobbers who solicit business in Florida in behalf of the Adgif division of Scripto are not "representatives" within the contemplation of the cited statute. It may be true that these wholesalers are not regular employees of Scripto and in their representation they operate under limited contractual authority. Nevertheless, it appears to us that to the extent of the authority granted to the Florida wholesale jobbers and the services which they render to Scripto in consideration of the commissions to be paid they are representatives of Scripto for the purpose of attracting, soliciting and obtaining Florida customers for the Scripto products. Admittedly, as the result of the solicitations of these ten or more Florida wholesale jobbers, the appellant disposes of substantial volumes of its product into the Florida consumer market. To hold that these Florida wholesalers are not "representatives" of Scripto appears to us to blind ourselves to the practical realities of the relationship between the manufacturer and the wholesaler who solicits business in behalf of the manufacturer for compensation in the form of a commission and as a result of whose efforts the manufacturer is enabled to reach a consumer market that otherwise would not be available to it. We, therefore, hold that Scripto, Inc. is a dealer within the contemplation of Section 212.06(2)(g), Florida Statutes.

Having so held we are next confronted with the contention of the appellant that if the statute is so construed, it contravenes the commerce clause and the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Florida Constitution. In this regard appellant asserts that the imposition of the use tax against the ultimate use and consumption of its commodity after it comes to rest in Florida constitutes an undue and therefore invalid burden on interstate commerce.

It is further asserted that when the State undertakes to compel appellant Scripto to register as a dealer and collect the use tax under the factual circumstances outlined, such action by the State amounts to a taking of its property without due process.

To meet the assault suggested by the arguments last epitomized we must determine whether the representation of Scripto by the ten or more Florida wholesale commission jobbers in the solicitation of Florida customers produces a sufficient jurisdictional contact between Scripto and the State of Florida as to justify the exercise of the taxing power by the State. We should have in mind that an aspect of the theory supporting the use tax is that it is an impost on the privilege of using personal property which might have been shipped into the State through interstate commerce but which has come to rest in the taxing forum and [fol. 117] has become a part of the mass of property with a taxing situs. The tax is imposed on the use after transit in interstate commerce has come to an end. The levy, of course, in actuality is imposed upon and collected from the ultimate Florida consumer who as a Florida resident enjoys the use of the property because of the opportunity afforded by the laws of the State of Florida to exercise this privilege, regardless of the source from whence the property came. We do not lose sight of the organic essential that in the imposition of a tax the lawmaking body is bound to respect jurisdictional limitations in the same fashion that a court must obtain jurisdiction in order to adjudicate the rights of litigants. However, for purposes of enforcing collection of a use tax we are not persuaded by the view that the dealer involved must necessarily be subject to the jurisdiction of the taxing forum to the extent that he would be amenable to suit in that situs. We have the view that even though a dealer is not represented in the taxing state to the extent that service of judicial process on his representative would necessarily bind him to respond in a matter in litigation; nonetheless, he can still be represented by solicitors and limited agents who contact Florida residents to the extent that jurisdictional contacts would thereby be established sufficient to support the enforced collection of the Florida use tax.

We think our position is sustained against the assault directed by the appellant by the opinion of the Supreme Court of the United States in *General Trading Company, a corporation, v. State Taxing Commission of the State of Iowa*, 322 U.S. 335, 64 Sup. Ct. 1028, 88 Law ed. 1309. The

factual situation in General Trading Company is almost identical to the situation presented here. The sole difference is that in the instant case the appellant was represented [fol. 118] by commission merchants who were not on its regular payroll but who nevertheless represented Scripto pursuant to a contract that authorized the Florida merchant to solicit orders and otherwise obtain business for Scripto in Florida in return for compensation to be paid in the form of a commission. The fact that General Trading Company was represented in the taxing state by regularly employed solicitors appears to offer no distinguishing characteristic that would preclude the application of the rule of that case to the situation presented by the case at bar. In General Trading Company, *supra*, the United States Supreme Court held that there were adequate jurisdictional contacts in the State of Iowa in the person of Iowa solicitors who contacted Iowa consumers in bringing about the sale of the commodities of a Minnesota corporation to support the exercise of Iowa's jurisdiction to collect a use tax on commodities shipped into Iowa from Minnesota in fulfillment of the orders obtained by the solicitors in Iowa. This was held to constitute no unconstitutional impediment to or burden upon interstate commerce. The fact that the Minnesota corporation was required to collect the use tax for the State of Iowa was found to be no deprivation of property without due process.

We might interpolate in passing that the Florida Sales and Use Tax Law contains the customary provisions against duplication of the tax, an allowance to the dealer for making the collection, and a reciprocal credit arrangement which credits against the Florida tax any amount up to the amount of the Florida tax which might have been paid to another state. See *General Trading Company v. State Tax Commission*, *supra*.

In the instant case appellant Scripto enjoys the privilege of being represented in Florida by numerous commissioned jobbers. In advancing the business enterprise of the appellant [fol. 119] ~~that~~ these representatives enjoy the benefits and protection of the laws of the State of Florida. It is no answer to point out that the Florida representatives of the appellant operate and own independent businesses as com-

missioned jobbers. To the extent that they contact Florida consumers in the interest of advancing appellant's business and in bringing about sales of appellant's commodities to Florida customers they are just as much representatives of the appellant under the subject statute as if they were salaried employee solicitors operating pursuant to identical limitations of contract. Bear in mind that these Florida jobbers represent appellant in Florida pursuant to specific written contracts. We are not persuaded that there is any substance to the contention that the manner in which the appellant arrives at the compensation paid to its Florida representative should distinguish this case from General Trading Company, *supra*.

We find support for the view which we here take in the opinion of the Court of Appeals of Maryland in *Topps Garment Mfg. Corp. v. State of Maryland*, 212 Md. 23, 128 A. 2d 595, where the Maryland court was confronted with practically the same factual situation presented to us by the case at bar. There, as here, the out-of-state corporation was represented in the State of Maryland only by solicitors who were furnished catalogs and order blanks but who were not on the payroll or under the supervision of the out-of-state corporation for which they solicited orders. In the interest of avoiding further lengthening this opinion we will not undertake to discuss in detail the Maryland decision last cited. It summarizes rather comprehensively practically all of the decisions of the Supreme Court of the United States and other courts on the subject of the enforced collection of a use tax on commodities sold by a [fol. 120] non-resident corporation and shipped to a taxing state via channels in interstate commerce. Anyone considering the instant problem might profitably refer to the opinion in the case last cited. Under the almost identical factual situation the Maryland court concluded, as we do here, that the non-resident corporation was bound to collect the Maryland use tax.

We have not ignored the decision of the Supreme Court of the United States in *Miller Brothers Co. v. State of Maryland*, 347 U.S. 340, 74 Sup. Ct. 535, 98 Law Ed. 744, relied upon with considerable confidence by the appellant. We think the *Miller Brothers Co.* case does not control the

instant situation. There the only "jurisdictional contact" between Miller Brothers Co., a Delaware corporation, and the State of Maryland was advertising in Delaware newspapers and radio stations that reached the notice of the Maryland residents and the occasional mailing of notices to former customers in Maryland. In Miller Brothers Co. there was no actual solicitation of business in the taxing state by representatives of the Delaware corporation. The non-resident corporation maintained no representation whatsoever in the taxing state. Justifiably, it appears to us, the essential aspects of jurisdictional contact for taxing purposes were lacking.

It is, therefore, our conclusion that in holding that Scripto, Inc. is a dealer within the contemplation of Chapter 212, Florida Statutes, and that as such it should register in the State of Florida as required by that act and collect and remit to the State of Florida through its Comptroller the use tax imposed by the State on the mechanical writing instruments sold to Florida customers by Scripto, Inc. via Adgif, the Chancellor ruled correctly.

The judgment is—

Affirmed.

TERRELL, C.J., THOMAS, HOBSON and O'CONNELL, JJ., concur

[fol. 122]

IN THE SUPREME COURT OF FLORIDA

SCRIPTO, Inc., a corporation organized and existing under the laws of the State of Georgia, Appellant,

—vs.—

DALE CARSON, as Sheriff of Duval County, Florida, and RAY E. GREEN, as Comptroller of the State of Florida, Appellees.

JUDGMENT—October 17, 1958

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective par-

ties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellees do have and recover of and from the Appellant costs in this behalf expended, herein taxed except the \$25.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Thornal was this day ordered to be filed.

[fol. 135]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—December 3, 1958

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

It is ordered by the Court that the said petition be, and the same is hereby, denied.

[fol. 141]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

**MOTION TO EXTEND TIME FOR FILING RECORD AND
DOCKETING APPEAL—filed April 21, 1959**

Appellant, Scripto, Inc., shows to the court as follows:

1.

Notice of Appeal to the Supreme Court of the United States was filed herein by Appellant on the 28th day of February, 1959. Under the rules of the Supreme Court of the United States, the appeal in this case must be docketed and the record filed in that Court not later than April 29, 1959, unless an extension of time therefor be granted.

2.

Mr. Davisson F. Dunlap, of counsel for the Appellant herein, has been continuously engaged in the trial of a case in the United States District Court for the Northern District of Florida during the four weeks preceding the filing of this motion.

3.

For the foregoing reason, it will be impossible for counsel for the Appellant to complete the preparation of the jurisdictional statement and to docket the same with the Supreme Court of the United States within the time required by the rules of that Court, unless such time be extended by this Court.

[fol. 143]

4.

Any Justice of this Court is authorized by Rule 13 (1) of the Rules of the Supreme Court of the United States to enlarge the time within which Appellant may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States.

Wherefore, Appellant moves the Court for an order extending the time within which the record on appeal may be filed, and the appeal docketed in the Supreme Court of the United States to and including the 29th day of May, 1959.

Ernest P. Rogers of Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia.

Clarence G. Ashby of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville 2, Florida.

Attorneys for Scripto, Inc., Appellant.

[fol. 144] Proof of service (omitted in printing).

[fol. 145]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

ORDER EXTENDING TIME TO DOCKET CASE ON APPEAL—

April 21, 1959

The foregoing motion of Scripto, Inc., Appellant, for an extension of the time within which to docket this case in the Supreme Court of the United States, having been read and considered, and it appearing therefrom that there is a good and adequate cause for the granting of said motion,

It is ordered that Scripto, Inc., Appellant, be, and it is hereby, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket this case on appeal in the Supreme Court of the United States.

This 21st day of April, 1959.

Glenn Terrell, Justice, Supreme Court of the State of Florida.

[fol. 147]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 29,426

SCRIPTO, Inc., a corporation organized and existing under the laws of the State of Georgia, Appellant

—vs—

DALE CARSON, as Sheriff of Duval County, Florida, and RAY E. GREEN, as Comptroller of the State of Florida, Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed February 28, 1959

1. Notice is hereby given that Scripto, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme

Court of the State of Florida entered in this action on December 3, 1958, affirming that part of the final decree of the Circuit Court for Duval County which denied injunctive relief on the ground that the requirement of Chapter 212, Florida Statutes, that plaintiff collect a use tax for the State of Florida is not an unreasonable burden on interstate commerce, and does not deprive the plaintiff of its property with due process of law.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Bill of complaint of plaintiff.
2. Answer of defendant, Al Cahill, Sheriff of Duval County, Florida.
- [fol. 148] 3. Answer of defendant, Ray E. Green, Comptroller of the State of Florida.
4. Stipulation of Fact, executed and filed by the parties on September 30, 1957, including all Exhibits attached thereto, except Exhibit "B" which shall be excluded.
5. Stipulation of the parties as to admissibility of exhibits, filed November 12, 1957, including all exhibits therein described and identified, except Exhibits IV and VI which shall be excluded.
6. Final decree of the Circuit Court of Duval County, Florida, dated December 13, 1957.
7. Notice of Appeal to the Supreme Court of Florida, filed by the plaintiff on February 7, 1958.
8. Motion for substitution of Dale Carson, as Sheriff of Duval County, Florida for Al Cahill, as Sheriff of said county, as a party defendant, and the order of court granting said motion.
9. Assignments of Error, filed by the plaintiff on February 17, 1958.

10. Opinion and judgment of the Supreme Court of Florida in said cause; Case No. 29,426, filed October 17, 1958.
11. Petition of appellant to the Supreme Court of Florida for a rehearing.
12. Appellees' reply to appellant's petition for rehearing.
13. Order and judgment of the Supreme Court of Florida denying appellant's petition for a rehearing, entered on December 3, 1958.
14. This Notice of Appeal.
15. The entries of filing of each and all parts of the record above specified.

III. The following questions are presented by this appeal:

[fol. 149]

1. Whether Chapter 212, Florida Statutes, and particularly, Section 212.06(2)(g) thereof, is repugnant to the commerce clause, Article I, Section 8, of the Constitution of the United States, in that said statute, as construed and applied in this case, requires an out-of-state seller, doing no intrastate business in the State of Florida, to collect and remit a use tax to that State on merchandise sold exclusively in interstate commerce to Florida consumers, from orders solicited by independent brokers.
2. Whether Chapter 212, Florida Statutes, and particularly Section 212.06(2)(g) thereof, is repugnant to the due process clause of Amendment XIV to the Constitution of the United States, in that said statute, as construed and applied in this case, requires an out-of-state seller to collect and remit a use tax to the State of Florida on merchandise sold to Florida consumers not by reason of any local business or activity of the seller in that State, but solely as a

result of orders solicited by independent brokers who are not agents or employees of the seller.

Ernest P. Rogers of Smith, Kilpatrick, Cody, Rogers & McClatchey, 1045 Hurt Building, Atlanta 3, Georgia.

Dayisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby, 1215 Barnett Bank Building, Jacksonville, Florida.

Attorneys for Scripto, Inc., Appellant.

[fol. 150] Acknowledgment of service (omitted in printing).

[fol. 151] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 152]

SUPREME COURT OF THE UNITED STATES

No. 80, October Term 1959

SCRIPTO, Inc., et al., Appellant,

—vs.—

Dale Carson, as Sheriff of Duval County, Florida, et al.

Appeal from the Supreme Court of the State of Florida.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

October 12, 1959

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SUPREME COURT U. S.

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MAY 27 1959
JAMES R. BROWNING, Clerk

IN THE **1959**
SUPREME COURT OF THE UNITED STATES.

**SCRIPTO, INC., a Corporation Organized and Existing
Under the Laws of the State of Georgia,
Appellant,**

v.

**DALE CARSON, as Sheriff of Duval County, Florida,
and RAY E. GREEN, as Comptroller of the
State of Florida,
Appellees.**

On Appeal from the Supreme Court of the
State of Florida.

STATEMENT AS TO JURISDICTION.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES.

**SCRIPTO, INC., a Corporation Organized and Existing
Under the Laws of the State of Georgia,
Appellant,**

v.

**DALE CARSON, as Sheriff of Duval County, Florida,
and RAY E. GREEN, as Comptroller of the
State of Florida,
Appellees.**

On Appeal from the Supreme Court of the
State of Florida.

STATEMENT AS TO JURISDICTION.

STATEMENT AS TO JURISDICTION.

Appellant appeals from a final judgment of the Supreme Court of the State of Florida affirming a final decree of the Circuit Court of Duval County, Florida, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial federal question is presented.

OPINION BELOW.

The opinion of the Supreme Court of the State of Florida is reported officially in 105 So. 2d 775. The final decree of the Circuit Court of Duval County, Florida, is not reported.

Copies of the opinion of the Supreme Court of Florida, the judgment of that court, and the final decree of the Circuit Court of Duval County, are attached hereto as Appendix A.

JURISDICTION.

This suit was brought by the appellant in the Circuit Court of Duval County, Florida, to enjoin the collection from appellant of a use tax assessed by the State Comptroller pursuant to Chapter 212, Florida Statutes, on the ground that said statute, if construed to make appellant liable for collection of such tax, violates the commerce clause of Article I, Section 8, and the due process clause of Amendment XIV of the Constitution of the United States, and is, therefore, invalid (R. 8). The Circuit Court construed said statute to impose such liability on appellant, sustained the validity of said statute as thus construed and applied, and denied appellant the relief sought (R. 95, 96). The Supreme Court of Florida affirmed the judgment of the Circuit Court on October 17, 1958, and on December 3, 1958, denied appellant's petition for rehearing (R. 122, 134). Appellant, on February 28, 1959, filed in the Supreme Court of Florida its notice of appeal to the Supreme Court of the United States (R. 147). By order dated April 21, 1959, a Justice of the Supreme Court of Florida, pursuant to Rule 13 of this Court, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket this case on appeal to the Supreme Court (R. 145).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Court to review the judgment on appeal in this case: **Dahnke-Walker Milling Co. v. Bon-durant**, 1921, 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239; **Standard Oil Co. of California v. Johnson**, 1942, 316 U. S.

481, 62 S. Ct. 1168, 86 L. ed. 1611; **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 74 S. Ct. 535, 98 L. ed. 744; and **Northwestern States Portland Cement Company v. State of Minnesota**, 1959, 355 U. S. 911, 79 S. Ct. 357, 2 L. ed. 2d 272.

STATUTE INVOLVED.

The statute which is involved, and the validity of which, as construed and applied in this case, is challenged by the appellant in this appeal, is Chapter 212, Florida Statutes, known as the Florida Sales and Use Tax Law (Florida Revenue Act of 1949, as amended through the year 1956). That statute is lengthy, and it is, therefore, set out in Appendix B hereto. The opinion and judgment of the Supreme Court of Florida is based primarily upon that court's interpretation of Section 212.06 (2) (g) of that statute which requires a "dealer" to collect the use tax and defines the term "dealer" as follows:

" 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser"

QUESTIONS PRESENTED.

1. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the commerce clause, Article I, Section 8, of the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller, engaged in no intrastate business or activity in connection with its sales to Florida consumers, to collect and remit a use tax.

to that State on merchandise sold exclusively in interstate commerce to such consumers on orders solicited by independent brokers.

2. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the due process clause of Amendment XIV to the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller to collect and remit a use tax to the State of Florida on merchandise sold to Florida consumers not by reason of any local business or activity of the seller in that State, but solely as a result of orders solicited by independent brokers who are not subject to the direction or control of the seller.

STATEMENT OF THE CASE.

A. Proceedings Below.

Appellant, a Georgia corporation with its principal office and place of business in the City of Atlanta, Georgia, brought this action in the Circuit Court of Duval County, Florida, against the Comptroller of that State and the Sheriff of that county, to enjoin a threatened attachment of certain accounts receivable of appellant for the satisfaction of use taxes which had been assessed against appellant by the Comptroller. Appellant prayed in that suit that the court would declare and decree that the assessment of such taxes against appellant by the Comptroller was illegal and invalid (R. 9).

For the sake of clarification, at this point it should be noted that two types of transactions by appellant were involved in the state court, but only one of those transactions is involved on this appeal. Appellant manufactures at its plant in Atlanta, Georgia, mechanical writing instruments

which it sells to independent jobbers throughout the United States, including the State of Florida. With those writing instruments, it distributes to the jobbers a metal container for displaying the writing instruments for sale. Both the writing instruments and the display container are subsequently resold by the jobber to retail dealers who in turn retain the display container and sell the merchandise therefrom. Such jobbers are not the same persons as the advertising specialty brokers or jobbers referred to herein-after in connection with appellant's Adgif sales. No question is involved on this appeal concerning the use tax consequences of any of the foregoing transactions. As a separate part of its business, appellant sells through Adgif Company, which is a division of appellant, mechanical writing instruments with advertising material printed thereon directly to consumers on orders solicited by independent advertising specialty brokers. It is with respect to these Adgif sales that the validity of the Florida Sales and Use Tax Law is questioned.

In Paragraph XI of its original complaint, appellant alleged that the said use tax assessment arising out of Adgif sales was illegal and invalid for the following reasons:

"(1) Scripto, Inc., is not required by the provisions of the Florida Sales and Use Tax Act, Chapt. 212, Florida Statutes, to register as an out-of-state dealer and collect the sales and use tax upon sales by Adgif Company, because such sales do not arise by reason of any business done by either Scripto, Inc., or Adgif Company in the State of Florida.

"(2) If said Statute be construed to require Scripto, Inc., to register as an out-of-state dealer and to collect the sales and use tax upon sales of Adgif Company, it imposes an unreasonable burden upon interstate commerce, in violation of Article I, Section 8 of

the Constitution of the United States, and deprives the plaintiff of its property without due process of law, in violation of Amendment XIV of the Constitution of the United States and Declaration of Rights, Section 12, of the Constitution of the State of Florida, and the said Statute is, therefore, invalid" (R. 8).

The parties stipulated the facts and the evidence in the case (R. 18, 25). The Circuit Judge, after consideration of the same and hearing argument thereon, on December 13, 1957, entered a final decree in which he construed the Florida statute to impose liability on appellant to collect and remit the use tax arising out of its Adgif sales, sustained the validity of the statute as thus construed and applied, and denied the prayers of appellant's complaint with respect thereto (R. 95; 96). The Circuit Court specifically sustained the validity of the said statute as against the constitutional objections thereto raised by appellant in its complaint: In Paragraph 3 of its final decree the Circuit Court held:

"3. That the requirements of said Chapter 212, Florida Statutes, 1955, that the plaintiff, as an out of state dealer, collect the use tax due the State of Florida for the use or consumption of merchandise sold by the plaintiff to Florida residents, for use and consumption as described in paragraphs 6, 7 and 8 of the said Stipulation of Fact, is a valid exercise of the taxing power of the State of Florida; is not an unreasonable burden upon interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States; and does not deprive the plaintiff of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and Section 12 of the Deelaration of Rights of the Constitution of the State of Florida as contended by plaintiff" (R. 95).

Appellant appealed to the Supreme Court of Florida, and specifically assigned error upon the foregoing findings of the trial court in Paragraph 3 of its final decree (R. 102, 103). The Supreme Court of Florida, on October 17, 1958, entered its order affirming the judgment of the Circuit Court (R. 122), and filed its opinion in which it ruled that "Scripto, Inc., is a dealer within the contemplation of Section 212.06 (2) (g), Florida Statutes," and that the statute so construed does not contravene the commerce clause or the due process clause of the Constitution of the United States (R. 116, 120).

Appellant, within the time provided by law, filed its petition for rehearing in the Supreme Court of Florida, again specifically urging the invalidity of the statute in question as applied to appellant under the commerce clause and the due process clause of the United States Constitution (R. 124-128). On December 3, 1958, the Supreme Court of Florida denied such petition for rehearing (R. 135). Appellant, on February 28, 1959, filed in that court its notice of appeal to the Supreme Court of the United States (R. 147).

B. The Stipulated Facts.

The material facts in this case appear in the stipulation of the parties. That stipulation is at page 18 et seq. of the record, and is printed as Appendix C hereto. Appellant's manufacturing plant and principal office and place of business is located in Atlanta, Georgia, where it is incorporated (R. 18, 19). There it manufactures mechanical writing instruments for sale throughout the United States, including Florida (R. 19). The only sales involved in this case, however, are those which appellant makes through its advertising specialty division, known as Adgif Company. Adgif is not a separate corporation from appellant, but maintains a separate office in Atlanta at which it is

engaged exclusively in selling mechanical writing instruments, manufactured by appellant, with advertising matter imprinted thereon (R. 21). Since Adgif sales are made to Florida residents for their use or consumption, there is no question that Florida is entitled to tax such use (R. 21). The sole question is whether appellant can be required to collect such tax and remit it to the State of Florida.

Neither appellant nor its Adgif division has qualified as a foreign corporation to do business in the State of Florida; neither owns, leases, or maintains in that State any office, distributing house, salesroom, warehouse, or other place of business; neither owns or maintains in that State any bank account, stock of merchandise, or any other property (R. 20, 23). Appellant employs a salesman who resides in Jacksonville, but that salesman does not solicit orders for Adgif products, nor does he in any way aid, assist or have any connection whatsoever with Adgif sales or distribution (R. 19, 21, 22). The sole function of that salesman is to solicit orders for appellant's regular line of products which are not sold through Adgif Company, and which are sold for resale. No orders for Adgif products are received from customers in the State of Florida by reason of solicitation or other activities of that salesman (R. 23). The Circuit Court found, and the Supreme Court of Florida agreed, that the presence and activity of such salesman does not make appellant a "dealer" as to Adgif sales, as the term dealer is defined in the Florida statute, but that appellant is a "dealer" solely because of the solicitation of Adgif orders by independent jobbers, as hereinafter described (R. 95, 115, 116).

Appellant has no employee or agent in the State of Florida who has anything to do with Adgif sales (R. 21-22). Orders for Adgif products are solicited by independent advertising specialty jobbers who are residents

of Florida (R. 21). Appellant, through Adgif Company, has a written agreement with each of those jobbers by which it is agreed that Adgif will pay a certain commission on all orders taken by the jobber in a described territory; that Adgif reserves the right to reject any and all orders; that the jobber is an independent contractor and shall not hold himself out as an employee or agent of Adgif nor make any collections nor incur any debts involving Adgif (Stip. Ex. C; R. 22, 91). The agreement requires nothing affirmative of the jobber; he is not required to solicit for Adgif alone, and no specified volume of Adgif orders is required of him. The agreement contemplates no control whatever over the jobber by appellant or Adgif. The jobber becomes "inactive" if he has not submitted any orders for sixty days, but the only consequence of such inactivity is loss of commissions on repeat orders received directly from customers (R. 91). The Florida jobbers who solicit orders for Adgif products do in fact deal in the products of other manufacturers as well (R. 109).

Orders for Adgif products solicited by such independent jobbers are sent directly to the home office of Adgif in Atlanta, Georgia, for acceptance or refusal, as provided by the terms and conditions printed on the order form (Stip. Ex. D; R. 22, 92). If the order is accepted by Adgif, the sale is consummated by shipment of the merchandise in interstate commerce, f. o. b. Atlanta, title passing to the purchaser at that time (R. 22, 92). Payment for the merchandise is made by the customer directly to Adgif in Atlanta on such terms as may be agreed upon between them (R. 22, 92). The jobber makes no collections or deliveries for Adgif (R. 22, 91, 92).

The Supreme Court of Florida agreed with appellant that the only relevant activity in the State of Florida, insofar as the use tax is concerned, is the solicitation of

orders for appellant's products by such independent advertising specialty jobbers (R. 115). The court ruled that such activity made appellant a "dealer" required to collect the use tax under Section 212.062 (2) (g) of the Florida statute, and held that the statute as thus construed and applied to appellant is a valid exercise by the State of Florida of its taxing power.

THE QUESTIONS ARE SUBSTANTIAL.

State power to make a tax collector of a foreign corporation has in this case been extended beyond limits previously defined by this Court. This Court has held that the commerce clause does not bar a state from imposing such duty on a foreign corporation which regularly enters the state through its employees to solicit orders for sales resulting in the taxable use. **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309; **Felt & Tarrant Mfg. Co. v. Gallagher**, 1939, 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488. Similarly, the due process clause does not prohibit the imposition of tax upon, nor a suit to collect the same from, a foreign corporation whose employees solicit orders from customers in the taxing state, where the tax is upon or arises out of such solicitation activity, because to the extent that a non-resident carries on activities in a state it must respond to obligations arising out of those very activities. **International Shoe Co. v. State of Washington**, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95.

This Court has never held, however, that a state has the power to burden an interstate sale with a tax or the seller with the duty of collecting a tax, nor to reach beyond its borders to collect such tax, unless the seller is present in the state and engages in some activity there in aid of the sale. To the contrary the Court has recently re-affirmed that both the due process and the commerce clauses of

the United States Constitution offer protection against such state action. The due process clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744. The commerce clause does not immunize interstate commerce from its fair share of state tax burdens so long as the taxable transaction is generated, in part at least, by activities of the interstate seller within the taxing state which are made possible by benefits derived from that state. **Northwestern States Portland Cement Company v. State of Minnesota**, 1959, 355 U. S. 911, 79 S. Ct. 357, 2 L. Ed. 2d 272. In the latter case, "substantial income producing activity in the taxing States" satisfied the requirements of due process. 79 S. Ct. 357, 366.

In the case at bar, appellant engages in no activity whatever in the State of Florida incident to its Adgif sales. All solicitation activity resulting in those sales is conducted by independent Florida jobbers and brokers who solicit for other manufacturers as well, and who are not controlled or directed in such activity by appellant. The Supreme Court of Florida was of the opinion that it is of no constitutional significance that Adgif orders are solicited not by employees or agents of appellant, but by independent Florida merchants, and ruled that **General Trading Co. v. State Tax Comm.**, 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309, is controlling here. The distinction between the **General Trading Co.** case and the case at bar is the distinction between engaging in limited activity in a state through one's own employees and engaging in no activity whatever within a state. The only activity carried on in the State of Florida in connection with the Adgif sales of appellant is the activity of independent contractors, Florida businesses which may be and presumably are required to bear their fair share of taxes for

the benefits which they derive from the state, and which may be required to collect the use tax from Adgif customers. In the latter connection, it is significant to note that Section 212.06 (2) (h) of the Florida statute specifically requires collection of the tax by such a solicitor, if the out of state seller refuses to register as a dealer.

This Court has consistently held that a foreign corporation is not subject to the jurisdiction of the courts of a state by reason of local activities on its behalf by a resident independent contractor, even though the resident may be a wholly owned subsidiary of the non-resident. **Cannon Mfg. Co. v. Cudahy Packing Co.**, 1925, 267 U. S. 333, 45 S. Ct. 250, 69 L. Ed. 634; **Consolidated Textile Corporation v. Gregory**, 1933, 289 U. S. 85, 53 S. Ct. 529, 77 L. Ed. 1047; **Bank of America v. Whitney Central National Bank**, 1923, 261 U. S. 171, 43 S. Ct. 311, 67 L. Ed. 594. The foregoing decisions are relevant and support appellant's position that the Florida statute is invalid as applied to appellant, because a state's jurisdiction to tax is substantially coextensive with the jurisdiction of its courts. **International Shoe Co. v. State of Washington**, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95.

As stated above, both the decree of the Circuit Court and the opinion of the Supreme Court of Florida are predicated upon a finding that the presence and activity in Florida of appellant's employee-salesman who has no connection whatever with Adgif sales is irrelevant under the Florida statute in determining whether appellant is a "dealer" required to collect the use tax on its Adgif sales. Both the final decree of the Circuit Court and the opinion of the Supreme Court base the finding of jurisdiction to impose the tax solely on the activity of the independent jobbers who solicit Adgif orders. If this Court should, however, consider itself permitted by the state of the record in this case to inquire whether the presence and activity of such employee-salesman in Florida furnishes

any additional basis for the imposition of the use tax in this case, it is clear that the power of Florida to require appellant to collect a use tax on its Adgif sales is not aided by that local activity of appellant. In both the **International Shoe**, 326 U. S. 310, and the **General Trading**, 322 U. S. 335, cases, the taxable event resulted from the very activity which was carried on by the appellant in the taxing state, and that fact was of primary importance in the decisions of the Court in those cases. In a case where the appellant made sales in a state, some resulting from local activity and others being entirely interstate in character, and where the appellant sustained the burden of separating the two, the Court held that the interstate sales cannot be taxed. **Norton Co. v. Department of Revenue of Illinois**, 1951, 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517. In **Nelson v. Sears, Roebuck & Co.**, 1941, 312 U. S. 359, 364, 61 S. Ct. 586, 588, 589, 85 L. ed. 888, the Court upheld a state's requirement that a seller collect the use tax on both its intrastate and its interstate sales, because the seller failed to carry the burden of showing that its interstate sales were separate and distinct from its local retail business. The state was, therefore, justified in assuming that the interstate sales were related to the seller's intrastate business. Furthermore, in that case, the seller had numerous retail stores within the state, had unconditionally qualified to do business in the state, and the evidence showed that there was some relationship between the business of the local retail stores and the interstate sales.

The stipulated facts in the case at bar state conclusively that appellant's Adgif sales are separate and distinct from its other sales, and that appellant receives no orders for Adgif products from consumers in the State of Florida by reason of the activity or presence of appellant's employee in that state. This stipulation removes the possibility of any finding or assumption that Adgif sales are related to or arise out of such limited activity of appellant in Florida.

The importance of the question raised by this appeal is ~~by~~ no means limited to the parties to this case, nor to the administration of the Florida Sales and Use Tax Law. Other states also are attempting to stretch their use tax statute to reach out of state sellers who sell on orders solicited by independent brokers. In **Topps Garment Manufacturing Corp. v. State of Maryland**, 212 Md. 23, 128 A. 2d 595 (Md., 1957), the Supreme Court of Maryland construed the use tax act of that state to apply to such a seller, and held that the statute so construed is valid. No appeal from that decision was filed. That there is confusion and need for clarification in this field is illustrated by the later decision of the Maryland Supreme Court in the case of **W. J. Dickey & Son, Inc., v. State Tax Commission of Maryland**, 212 Md. 607, 131 A. 2d 277 (Md., 1957). In that case the court held that the entire net income of a Maryland manufacturing company was allocable to and subject to taxation in Maryland in spite of the fact that some of its sales in other states arose out of orders solicited in those states by an independent broker. In other words, the Maryland court held that the Maryland manufacturing company was not doing business in the other states by reason of the activity of the independent broker. The court with some difficulty distinguishes the **Topps Garment Manufacturing Corp.** case as turning on a question of statutory interpretation. 131 A. 2d 277, 280. See also **People v. West Pub. Co.**, 35 C. 2d 80, 216 P. 2d 441 (Calif., 1950), as compared to **Irvine Co. v. McColgan**, 26 C. 2d 160, 157 P. 2d 847, 852 (Calif., 1945). These cases illustrate that the states in their zeal to collect additional revenue are not only ignoring traditional concepts of jurisdiction to tax, but are prone to apply different concepts in different cases where necessary to sustain the validity of the tax. Clarification of this area by this Court would, therefore, seem necessary and desirable.

CONCLUSION.

The jurisdiction of the Supreme Court to review this case on appeal is clear and unquestionable. Because of the importance of the issues involved and the apparent error in the judgment of the state court, appellant urges that the Supreme Court give plenary consideration to the case and permit briefs and oral argument on the merits,

Respectfully submitted,

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Proof of Service.

I, Ernest P. Rogers, attorney for Scripto, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1959, I served copies of the foregoing Statement as to Jurisdiction on the appellees therein named, as fol-

lows: on Dale Carson, as Sheriff of Duval County, Florida, and Ray E. Green, as Comptroller of the State of Florida, by mailing copies in a duly addressed envelope, with air mail postage prepaid, to Richard W. Ervin, Attorney General, State of Florida, State Capitol Building, Tallahassee, Florida, attorney of record for said appellees.

Ernest P. Rogers,
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APPENDIX A.

Text of Statute Involved.

Chapter 212.

Florida Statutes.

Tax on Sales, Use and Certain Transactions.

212.01 Short title.—This chapter shall be known as the "Florida revenue act of 1949" and the taxes imposed herein shall be in addition to all other taxes imposed by law.

212.02 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit, and shall include any political subdivision, municipality, state agency, bureau or department, and the plural as well as the singular number.

(2) "Sale" means (a) any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and (b) shall include the rental of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses or rooming houses, tourist or trailer camps, as hereinafter defined in this chapter, and (c) includes the producing, fabricating, processing, printing or imprinting of tangible per-

sonal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting, and (d) the furnishing, repairing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, repairing, or serving such tangible personal property.

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price, shall be deemed a sale..

(3) (a) "Retail sale" or a "sale at retail" means a sale to consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions that may be made in lieu of "retail sales" or "sales at retail." A resale must be in strict compliance with rules and regulations and any dealer making a sale for resale which is not in strict compliance with rules and regulations shall himself be liable for and pay the tax.

(b) The terms "retail sales," "sale at retail," "use," "storage" and "consumption" shall not include the sale, use, storage or consumption of industrial materials for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials become a component part of the finished product or are used directly and immediately dissipated in fabricating, converting or processing such materials or parts thereof, nor shall such term include materials, containers, labels, sacks or bags intended to be used one time only for packaging tangible personal property for shipment or sale.

(c) The term "gross sales" means the sum total of all retail sales of tangible personal property as defined herein, without any deduction whatsoever of any kind or character, except as provided in this chapter.

(4) "Sales price" means the total amount for which tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses, or any other expense whatsoever; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing the property sold.

(5) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges, or any expenses whatsoever.

(6) "Lease," "let," or "rental" means leasing or renting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, the same being defined as follows:

(a) Every building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are supplied for pay to transient or permanent guests or tenants, in which ten or more rooms are furnished for the accommodation of such guests, and having one or more dining rooms or cafes where meals or lunches are served to such transient or permanent guests, such sleeping accommodations and dining rooms or cafes being conducted in the same building or buildings in connection therewith, shall, for the purpose of this chapter, be deemed a hotel.

(b) Any building or part thereof, where separate accommodations for more than two families living independ-

ently of each other are supplied to transient or permanent guests or tenants, shall for the purpose of this chapter be deemed an apartment house.

(c) Every house, boat, vehicle, motor court, trailer court or other structure or any place or location kept, used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this chapter be deemed a rooming house.

(d) In all hotels, apartment houses and rooming houses within the meaning of this chapter, the parlor, dining room, sleeping porches, kitchen, office and sample rooms shall be construed to mean rooms.

(e) A tourist camp is a place where two or more tents, tent houses or camp cottages are located and offered by a person or municipality for sleeping or eating accommodations, most generally to the transient public, for either a direct money consideration or an indirect benefit to the lessor or owner in connection with a related business. A trailer camp is a place where space is offered, with or without service facilities, by any persons or municipality to the public for the parking and accommodation of two or more automobile trailers which are used for lodging, for either a direct money consideration or an indirect benefit to the lessor or owner in connection with a related business, such space being hereby defined as "living quarters," and the rental price thereof shall include all service charges paid to the lessor.

(f) "Lease," "let" or "rental" also means the leasing or rental of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration, without transfer of the title of such property, except as expressly provided to the contrary herein. Provided that,

where two taxpayers, in connection with the interchange of facilities, rent or lease property, each to the other, for use in providing or furnishing any of the services mentioned in § 167.431, the term "lease" or "rental" shall mean only the net amount of rental involved.

(7) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business.

(8) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it shall not include the sale at retail of that property in the regular course of business.

(9) "Business" includes any activity engaged in by any person, or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed in this chapter to include occasional and isolated sales or transactions involving tangible personal property by a person who does not hold himself out as engaged in business, but shall include all charges of admission and all rentals and leases of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, made subject to a tax imposed by this chapter.

(10) "Retailer" means and include every person engaged in the business of making sales at retail, or for distribution, or use, or consumption, or storage to be used or consumed in this state.

(11) The term "comptroller" means and includes the comptroller of the state or his duly authorized assistants.

(12) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities, or intangibles as defined by the intangible tax law of the state nor pari-mutuel tickets sold or issued under the racing laws of the state.

(13) The term "use tax" referred to in this chapter includes the "use," the "consumption," the "distribution," and the "storage" as herein defined.

(14) The term "intoxicating" or "alcoholic beverages" referred to in this chapter includes all such beverages as are so defined or may be hereafter defined by the laws of the state.

(15) The terms "cigarettes" or "tobacco" or "tobacco products" referred to in this chapter includes all such products as are defined or may be hereafter defined by the laws of the state.

(16) The term "admissions" shall mean and include the net sum of money after deduction of any federal taxes for admitting a person or vehicle, or persons, to any place of amusement, or where there is any show, game or exhibition, and where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, and cover charges; except that in case the amount paid for admission is less than forty cents, exclusive of federal tax, no tax shall be imposed. Provided, however, that whenever the federal tax on amusement admissions becomes ten percent or less on such admissions, then the foregoing exemption on admissions of less than forty cents shall terminate beginning the first day of the first month immediately following.

213.03 Transient rentals tax; rate, procedure, enforcement, etc.—

(1) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing or letting any living quarters, sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, rooming house, tourist or trailer camp, as hereinbefore defined in this chapter. For the exercise of said privilege a tax is hereby levied as follows: in the amount equal to three per cent of and on the total rental charged for such living quarters, sleeping or housekeeping accommodations by the person charging or collecting the rental; provided that such tax shall apply to hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, whether or not there be in connection with any of the same, any dining rooms, cafes or other places where meals or lunches are sold or served to guests.

(2) The tax provided for herein shall be in addition to the total amount of the rental and shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment. The owner, lessor or person receiving the rent shall remit the tax to the comptroller at the times and in the manner hereinafter provided for "dealers" to remit taxes under this chapter. The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of the tax, the making of returns, the keeping of books, records and accounts and the compliance with the rules and regulations of the comptroller in the administration of this chapter shall apply to and

be binding upon all persons who manage or operate hotels, apartment houses, rooming houses, tourist and trailer camps, and to all persons who collect or receive such rents on behalf of such owner or lessor taxable under this chapter.

(3) Where rentals are received by way of property, goods, wares, merchandise, services or other things of value, the tax shall be at the rate of three per cent of the value of said property services or other things of value.

(4) The tax levied by this section shall not apply to, be imposed upon, or collected from any person who shall reside continuously longer than six months at any one hotel, apartment house, rooming house, tourist or trailer camp, and shall have paid the tax levied by this section for six months of residence in any one hotel, rooming house, apartment house, tourist or trailer camp.

(7) The tax imposed by this section shall constitute a lien on the property of the lessee or rentee of any sleeping accommodations in the same manner as and shall be collectible as are liens authorized and imposed by §§ 85.19 and 85.20.

(8) For the purposes of this section, six months shall mean: one hundred and eighty consecutive days.

212.04 Admissions tax; rate; procedure, enforcement, etc.—It is hereby declared to be the legislative intent that every person exercising a taxable privilege who sells or receives anything of value, by way of admissions and that every person who sells admissions to any place of amusement, or for the privilege of entering or staying in any place of amusement, inclusive of admissions to theatres, outdoor theatres, shows, exhibitions, games, races and any place where charge is made through any selling of tickets, gate charges, seat charges, box charges, season pass

charges, and cover charges or receipts of anything of value measured on an admission or length of stay, or seat box accommodations, in any place of business or where there is any exhibition or entertainment, shall be subject to a tax for the exercise of such privilege. Provided, however, that no municipality of the state shall hereafter levy an excise tax on amusement admissions. For the exercise of said privilege a tax is levied as follows:

(1) At the rate of three per cent of sales price or the actual value received for such admissions, the said three per cent to be added and collected with all such admissions from the purchaser thereof, and such tax shall be paid for the exercise of the privilege as defined in the preceding paragraph.

(2) The sale price or actual value of admission shall, for the purpose of this chapter, be that price remaining after deduction of federal taxes, if any, imposed upon said admission; except that in case the amount paid for admission is less than forty cents, exclusive of federal tax, no tax shall be imposed; provided, however, that whenever the existing federal tax on admissions becomes ten percent or less then the exemptions applying to admissions of less than forty cents shall terminate beginning the first day of the first month immediately following. There shall also be exempted all admissions to places of amusement operating under the supervision of the state racing commission.

(3) Such taxes shall be paid and remitted at the same time and in the same manner as provided for remitting taxes on sales of tangible personal property, as herein-after provided.

(4) Each person who, after November 1, 1949, exercises the privilege of charging admission taxes, as herein de-

fined, shall apply for and at that time shall furnish the information and comply with the provisions of § 212.18, not inconsistent herewith, and receive from the comptroller a certificate of right to exercise such privilege, which certificate shall apply to each place of business where such privilege is exercised, and shall be in the manner and form prescribed by the comptroller. Such certificate shall be issued upon payment to the comptroller of a registration fee of one dollar by the applicant. The county tax collectors are hereby made the agents of the comptroller for the purpose of issuing such certificates within the respective counties and upon application they shall issue such certificate, the county tax collector shall forward a copy of each of the same to the comptroller. Each person exercising the privilege of charging such admission taxes as herein defined shall cause such records and accounts showing the admission which shall be in the form as the comptroller may from time to time prescribe inclusive of records of all tickets numbered and issued for a period of not less than two years, and inclusive of all bills or checks of customers who are charged any of the taxes defined herein, showing the charge made to each for a period of not less than two years. The comptroller shall be empowered to use each and every one of the powers granted herein to the comptroller to discover the amount of tax to be paid by each such person, and to enforce the payment thereof as are hereby granted the comptroller for the discovery and enforcement of the payment of taxes hereinafter levied on the sales of tangible personal property. The failure of any person to pay such taxes before the twenty-first day of the succeeding month after the same are collected shall render such person liable to the same penalties that are hereafter imposed upon such person for being delinquent in the payment of taxes imposed upon the sales of tangible personal property and the failure of any person to render returns and to pay taxes as prescribed herein shall render such person sub-

ject to the same penalties, by way of charges for delinquencies, at the rate of five per cent per month for the total amount of tax delinquent up to a total of twenty-five per cent of such tax, and at the rate of fifty per cent penalty for attempted evasion of payment of any such tax, or for any attempt to file false or misleading returns that are required to be filed by the comptroller.

(5) All of the provisions of this chapter relating to collection, investigation, discovery and aids to collection of taxes upon sales of tangible personal property shall likewise apply to all privileges described or referred to in this section, and the obligations imposed in this chapter upon "retailers" are hereby imposed upon the seller of such admissions. Where tickets or admissions are sold and not used but returned and credited by the seller, the seller may apply to the comptroller for a credit allowance for such returned tickets or admissions where advance payments have been made by the buyer and have been returned by the seller upon such form and in such manner as the comptroller may from time to time prescribe, and the comptroller may upon obtaining satisfactory proof of the refunds on the part of the seller credit the seller for taxes paid upon admissions that have been returned unused to the purchaser of those admissions. The seller of admissions upon the payment of the taxes before they become delinquent and the rendering of the returns in accordance with the requirement of the comptroller, and as provided in this law, shall be entitled to a discount of three per cent of the amount of taxes upon the payment of the same before the same become delinquent, in the same manner as permitted the sellers of tangible personal property in this chapter.

(6) Admission taxes required to be paid by this chapter shall be paid to the comptroller by the owner or the collector of such admission, and where any place of business is sold or transferred by any owner, or owners, thereof,

wherein such admission taxes have or are accruing shall be obligated before such sale becomes effective to notify the comptroller of such pending sale and secure from the comptroller a permit as prescribed in this section, and the purchaser shall become obligated to withhold from the sales price such sum of money as will safely be required to discharge all accrued admission taxes upon such places of business, and that upon the failure of any such purchaser or purchasers shall become obligated to pay all accrued admission taxes, and the same shall become a lien upon all the purchaser's assets until the same shall have been paid and fully discharged.

(7) That the taxes under this section shall become a lien upon the assets of the owner of any business exercising the privilege of selling admissions, and the collection of such admissions, as defined hereunder, and shall remain a lien until fully paid and discharged, and such lien may be enforced in the manner provided hereinafter for the enforcement of the collection of taxes imposed upon the sales of tangible personal property.

(8) The word "owners" as used in this law shall be taken to include and mean all persons obligated to collect and pay over to the state the tax imposed under this section, inclusive of all holders of permits issued as herein provided, and wherever the words "owner" or "owners" are used herein it shall be taken to mean and include all persons liable for such admission taxes unless and except it appear from the context that the words are descriptive of property owners.

212.05 Sales, storage, use tax.—It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable

under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state. For the exercise of said privilege a tax is levied as follows:

- (1) At the rate of three per cent of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax may be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.
- (2) At the rate of three per cent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; provided there shall be no duplication of the tax.
- (3) At the rate of three per cent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, except the rental of motion picture film, where the lease or rental of such property is an established business or part of an established business, or the same is incidental or germane to said business.
- (4) At the rate of three per cent of the lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.
- (5) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.
- (6) The tax so levied is and shall be in addition to all other taxes, whether levied in the form of excise, license or privilege taxes, and shall be in addition to all other fees and taxes levied.

212.06 Same; collectible from dealers; dealers defined; dealers to collect from purchasers; legislative intent as to scope of tax.—

(1) The aforesaid tax at the rate of three per cent of the retail sales price, as of the moment of sale, or three per cent of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution and the storage for use or consumption in this state, of tangible personal property.

(2) (a) The term "dealer" as used in this chapter shall include every person, as used in this chapter, who manufactures or produces tangible personal property for sale at retail, for use, consumption or distribution, or for storage to be used or consumed in this state.

(b) The term "dealer" is further defined to mean every person, as used in this chapter, who imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

(c) The term "dealer" is further defined to mean every person, as used in this chapter, who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein.

(d) The term "dealer" is further defined to mean any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property.

(e) The term "dealer" is further defined to mean any person, as used in this chapter, who leases or rents tangible personal property, as defined in this chapter, for a consideration, permitting the use or possession of said property without transferring title thereto, except as expressly provided for to the contrary herein.

(f) The term "dealer" is further defined to mean any person as used in this chapter, who maintains or has within this state, directly or by a subsidiary, an office, distributing house, salesroom, or house, warehouse or other place of business.

(g) "Dealer" also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with.

(h) "Dealer" also means and includes every person who, as a representative, agent, or solicitor, of an out-of-state principal or principals, solicits, receives and accepts orders from consumers in the state for future delivery and whose principal refuses to register as a dealer.

(3) Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, or use or other consumption, in this state, shall at the time of making sales, collect the tax imposed by this chapter from the purchaser.

(4) On all tangible personal property imported or caused to be imported from other states, territories, the District of Columbia, or any foreign country, and used by him, the

"dealer" as herein defined, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(5) It is not the intention of this chapter to levy a tax upon tangible personal property imported, produced or manufactured in this state for export, provided that tangible personal property shall not be considered as being imported, produced or manufactured for export unless the importer, producer or manufacturer delivers the same to a licensed exporter for exporting, or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state; nor is it the intention of this chapter to levy a tax on radio broadcasting, or any sale which the state is prohibited from taxing under the constitution or laws of the United States.

(6) It is, however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass property of this state.

(7) The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another state, the proof of payment of such tax to be accord-

ing to rules and regulations made by the comptroller. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the comptroller an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this chapter.

(8) It is further specifically provided that the "use tax" shall not apply to tangible personal property owned or acquired in this state, or imported into this state or held or stored in this state prior to November 1; 1949. But the "use tax" will apply to all tangible personal property imported or caused to be imported into this state on or after November 1, 1949, unless it appears that said property has previously borne a sales or use tax in another state equal to or greater than the tax imposed by this chapter.

(9) The taxes imposed by this chapter shall not apply to the use, sale or distribution of religious publications, Bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices and like church service and ceremonial raiments and equipment.

212.07 Same; tax added to purchase price; dealer not to absorb; penalties; general exemptions.—

(1) The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.

(2) Dealers shall, as far as practicable, add the amounts of the tax imposed under this chapter to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees, of tangible personal property

which is subject to the tax imposed by this chapter, shall be liable for and pay the tax himself.

(3) Any dealer who shall fail, neglect or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one hundred dollars or imprisonment in the county jail for not more than three months, or both, in the discretion of the court.

(4) A person engaged in any business taxable under this chapter shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred fifty dollars, or imprisonment in the county jail for not exceeding three months, or both, in the discretion of the court. For a second or subsequent offense, the penalty shall be double.

(5) The gross proceeds derived from the sale in this state of livestock, poultry and other farm products, direct from the farm are exempted from the tax levied by this chapter, provided that such sales are made directly by the producers. The producers shall be entitled to such exemptions although said livestock so sold in this state may have been registered with a breeders or registry association prior to said sale and although said sale takes place at a livestock show or race meeting, so long as said sale is made by the original producer and within this state. When sales of livestock, poultry or other farm products are made to consumers by any person, as defined herein,

other than a producer, they are not exempt from the tax imposed by this chapter.

(6) It is specifically provided that the "use tax" as defined herein shall not apply to livestock and livestock products, to poultry and poultry products, to farm and agricultural products, when produced by the farmer and used by him and members of his family and his employees on the farm.

(7) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to any other person who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempted from any and all provisions of this chapter; including payment of the tax applicable to the sale, storage, use, transfer or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one tax be exacted.

(8) The term "agricultural commodity," for the purposes hereof, shall mean horticultural, poultry and farm products, and livestock and livestock products.

212.08 Same; specific exemptions.—The sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of the following tangible personal property is hereby specifically exempt from the tax imposed by this chapter.

(1) General groceries, including particularly, food and food products, milk, butter, eggs, meats (fresh, salt and cured), flour, meal, cereals, bread, vegetables and vegetable juices, fruit and fruit juices, canned foods (not including

gum and soft drinks, or articles that are not edible), also candy where the price at which the same is sold is twenty-five cents or less. "Food products" as used herein shall mean and include cereal and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, fruit and fruit products, spices, salt and sugar, coffee and coffee substitutes, teas and cocoa, condiments, relishes, spreads, shortening and flavoring, and also bakery products; but shall not include meals, packaged lunches or sandwiches prepared or sold in or by restaurants, drug stores, lunch counters, cafeterias, hotels, or other like places of business, or by any business or place licensed by the hotel and restaurant commission of the state.

(2) There shall be exempt from so much of the tax imposed by this chapter as shall exceed three hundred dollars on the sale, use, storage or other consumption in this State of machines and equipment and parts therefor used in farming, mining, quarrying, compounding, processing, producing or manufacturing of tangible personal property for sale, or used in furnishing communication or transportation services, provided that the term "machine and equipment and parts therefor" as used herein, shall mean only any machines and equipment and parts therefor which are specifically designed and used for farming, mining, quarrying, compounding, processing, producing, manufacturing, storing or refrigerating tangible personal property, or used in furnishing communication or transportation services. The comptroller is hereby authorized to promulgate rules and regulations not inconsistent with this section further defining "machines and equipment and parts therefor" for the purpose of enforcement of uniformity in tax collections hereunder.

(3) There shall also be exempted all sales made to the United States government, the state or any county, municipality, or political subdivision of this state and in-

cluding sales or tangible personal property made to contractors employed by any such government or political subdivision thereof where such tangible personal property goes into and becomes a part of public works owned by such government or political subdivision thereof. Also exempted are vehicles and vessels and parts thereof used to transport passengers or property in interstate and foreign commerce.

(4) (a) Also exempted from the tax imposed by this chapter are fuels (including crude oil, fuel oil, gasoline, kerosene, lubricating oil, diesel oil, coal, coke and cord-wood), motor vehicles and motor-propelled agricultural equipment (not including parts thereof when sold as separate transactions), cigarettes, alcoholic beverages, beer, water (not exempting mineral water or carbonated water), ice, medicine compounded in a retail establishment by a pharmacist licensed by the state according to an individual prescription or prescriptions written by a practitioner of the healing arts licensed by the state, and common household medicinal remedies recommended and generally sold for the relief of pain, ailments, distress or disorders of the human body, according to a list prescribed and approved by the state board of health, which said list shall be certified to the comptroller from time to time and be included in the rules and regulations promulgated by the comptroller. Other exemptions are electric power or energy, communication services, natural, artificial or liquefied petroleum gases, nets and ships used directly in and by licensed commercial fisheries, feeds, fertilizers, insecticides and fungicides used for application on crops or groves, and containers used for processing farm products and also field and garden seeds; newspapers, film rentals, school books and school lunches. Also exempted are professional, insurance or personal service transactions which involve sales as inconsequential elements for which no separate charges are made.

(b) The above exempted personal service transactions do not exempt the sale of information services involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or other persons acting in a representative or fiduciary capacity or information services furnished to newspapers. "Information services" shall mean and include the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons.

(5) Patients, inmates and guests of any hospital, or institution designed and operated primarily for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or for any reason dependent upon special care or attention, are exempt from the tax imposed by this chapter on rentals and meals.

(6) There shall be exempt from the provisions of this chapter cheesecloth for shading tobacco and seed beds, machines and equipment used in plowing, planting, cultivating and harvesting crops; articles sold or leased to churches or other nonprofit religious, nonprofit educational, or nonprofit charitable institutions in the course of their customary nonprofit religious, nonprofit educational, or nonprofit charitable activities; artificial eyes, limbs, crutches, eyeglasses, dentures, hearing devices, prosthetic and orthopedic appliances, funerals, when the total cost thereof is five hundred dollars or less.

(7) There shall likewise be exempt from the tax imposed by this act all charges for services rendered by radio and television stations, including advertising, line charges, talent fees or charges, and for film and transcriptions and other expendable items used in producing radio or television broadcasts.

(8) There shall likewise be exempt from the tax imposed by this chapter articles of clothing, including shoes, hats and underwear, where the price at which the same is sold is ten dollars or less, on any single item thereof; provided, that sales of articles of clothing ordinarily sold or offered for sale as a pair, or as a suit or ensemble, shall be considered single items under this exemption, provided fabrics by the yard classified as wearing apparel fabrics shall be included in the term "articles of clothing."

(9) There shall likewise be exempt from the tax on admissions levied by this chapter, all admissions to athletic contests or other sports events, not prohibited by law, the proceeds of which go entirely to the support of a hospital for crippled children, which hospital is subsidized by the Florida crippled children's commission, out of state funds; provided that, in order to qualify for such exemptions, no part of the net proceeds of such athletic contest or other sports event shall inure to the benefit of any private stockholder or individual.

212.09 Same; trade-ins deducted.—

(1) Where used articles are taken in trade, or a series of trades, as a credit or part payment on the sale of new articles, the tax levied by this chapter shall be paid on the sales price of the new article, less the credit for the used article taken in trade.

(2) Where used articles are taken in trade, or a series of trades, as a credit or part payment on the sale of used articles, the tax levied by this chapter shall be paid on the sales price of the used article less the credit for the used article taken in trade.

212.10 Sales of business; liability for tax, procedure, penalty for violation.—

(1) If any dealer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods, or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting the business; his successor, successors, or assigns, if any, shall withhold a sufficient portion of the purchase money to safely cover the account of such taxes, interest, and penalties due and unpaid until such former owner shall produce a receipt from the comptroller showing that they have been paid or a certificate stating that no taxes, interest, or penalties are due. If the purchasers of a business or stock of goods shall fail to withhold a sufficient amount of the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accruing and unpaid on account of the operation of the business by any former owner, owners or assigns.

(2) In the event any dealer is delinquent in the payment of the tax herein provided for, the comptroller may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such dealer or owing any debts to such dealer at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make any other disposition of such credits or other personal property, or debts until the comptroller shall have consented to a transfer or disposition, or until thirty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the comptroller of any and all such credits, or other personal property, or debts in their possession, under their control, or owing by them, as the case may be.

(3) Any violation of the provisions of this section shall be a misdemeanor and punishable as such.

212.11 Tax returns and regulations.—

(1) That the taxes levied hereunder upon rentals, admissions and sales of tangible personal property shall be due and payable monthly beginning on the first day of November, 1949, and for the purpose of ascertaining the amount of tax payable under this chapter, it shall be the duty of all dealers to make a return, on or before the twentieth day of the month to the comptroller, upon forms prepared and furnished by him, showing the rentals, admissions, gross sales or purchases as the case may be, arising from all leases, rentals, admissions, sales or purchases, taxable under this chapter during the preceding calendar month.

(2) Gross proceeds from rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect thereto in accordance with such rules and regulations as the comptroller may prescribe.

(3) Whenever the tax on rentals of any machine described in § 212.08, shall amount to the total tax which would have been paid on said machine had the same been a sale rather than a rental, then there shall be no further rental tax collected thereon.

(4) Except as otherwise expressly provided for herein, it is hereby declared to be the intention of this chapter to impose a tax on the gross proceeds of all leases and rentals of tangible personal property in this state where the lease or rental is a part of the regularly established business, or the same is incidental or germane thereto.

212.12 Dealer's credit for collecting tax; penalties for noncompliance; powers of comptroller in dealing with delinquents; brackets applicable to taxable transactions; records required.—

(1) For the purpose of compensating the lessor of real and personal property taxed hereunder, and for the purpose of compensating dealers in tangible personal property and for the purpose of compensating owners of places where admissions are collected, as compensation for the keeping of prescribed records and the proper accounting and remitting of taxes by them, such seller, lessor, owner and dealer shall be allowed three per cent of the amount of the tax due and accounted for and remitted to the comptroller, in the form of a deduction in submitting his report and paying the amount due by him, and the comptroller shall allow the said deduction of three per cent of the amount of the tax to the person paying the same for remitting the tax in the manner herein provided, and for paying the amount due to be paid by him provided, however, that the three per cent allowance shall not be granted nor shall any deduction be permitted where the tax is delinquent at the time of payment, or where there is a manifest failure to maintain proper records or make proper prescribed reports; and as further compensation to dealers in tangible personal property for the keeping of prescribed records and collection of taxes and remitting the same, §§ 204.03 and 204.04, relating to inventory tax be and the same are hereby repealed.

(2) When any person, firm or corporation required hereunder to make any return or to pay any tax imposed by this chapter, shall fail to make such return or shall fail to pay such tax, within the time required hereunder, in addition to all other penalties provided herein, and by the laws of Florida in respect to such taxes, the specific penalty shall be added to the tax in the amount of five

per cent if the failure is for not more than thirty days, with an additional five per cent for each additional thirty days, or fraction thereof, during the time which the failure continues, not to exceed, however, a total penalty of twenty-five per cent in the aggregate. In the case of a false or fraudulent return or a wilful intent to evade payment of any tax imposed under this chapter, in addition to the other penalties provided by law, the person making such false or fraudulent return or wilfully attempting to evade the payment of such a tax shall be liable to a specific penalty of fifty per cent of the tax bill and for fine and punishment as provided by law for a conviction of a misdemeanor.

(3) When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax shall be required by law to be paid, there shall be added to the amount due interest at the rate of six per cent per annum from the date due until paid.

(4) All penalties and interest imposed by this chapter shall be payable to and collectible by the comptroller in the same manner as if they were a part of the tax imposed.

(5) The comptroller for good cause shown by written request, may extend, but not to exceed thirty days, the time for making any returns required under the provisions of this chapter, and may compromise penalties after his investigation reveals that the penalty would be too severe or unjust, but interest shall be collected.

(6) In the event any dealer, or other person charged herein, fails to make a report and pay the tax as provided by this chapter, or in case any person receiving rentals, or any dealer, owner or person charged herein with the duty to report, fails to make a report, or makes a grossly incorrect report, or makes a report that is false or fraudu-

lent, then in either such event, it shall be the duty of the comptroller to make an assessment from an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds from rentals, or the total admissions received or amounts received from leases of tangible personal property by a dealer, and an assessment from an estimate of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state of tangible personal property with interest, plus penalty, if such have accrued, and as the case may be, then the comptroller shall proceed to collect such taxes on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner or lessor as the case may be,

(7) The comptroller is given the power to prescribe the records to be kept by all persons subject to taxes imposed by this chapter and it shall be the duty of every person required to make a report and pay any tax under this chapter, and every person receiving rentals, and owners of places of admission, to keep and preserve suitable records of the sales, leases, rentals, admissions, or purchases, as the case may be, taxable under this chapter, and such other books of account as may be necessary to determine the amount of tax due hereunder, and other information as may be required by the comptroller; and it shall be the duty of every such person so charged with such duty, moreover, to keep and preserve, for a period of two years, all invoices and other records of goods, wares and merchandise, records of admissions, leases and rentals and all other subjects of taxation under this chapter; and all such books, invoices and other records shall be open to examination at all reasonable hours to the comptroller or any of his duly authorized agents.

(8) In the event the dealer has imported the tangible personal property and he fails to produce an invoice show-

ing the cost price of the articles as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the comptroller shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax thereon with interest plus penalties, if such have accrued on the true cost price as assessed by him. The assessment so made shall be considered prima facie correct, and the duty shall be on the dealer to show to the contrary.

(9) In the case of the lease or rental of tangible personal property, or other rentals as herein defined and taxed, if the consideration given or reported by the lessor, person receiving rental or dealer does not, in the judgment of the comptroller, represent the true or actual consideration, then the comptroller is authorized to ascertain the same and assess and collect the tax thereon in the same manner as above provided, with respect to imported tangible property, together with interest, plus penalties, if such have accrued.

(10) Taxes imposed by this chapter upon the privilege of the use, consumption, or storage for consumption, or sale of tangible personal property, admissions and rentals as herein taxed shall be collected upon the basis of an addition of three per cent to the total price of such admissions, rentals, or sale price of such article or articles that are purchased, sold or leased at any one time by or to a customer or buyer, and the dealer, or person charged herein, is required to pay a privilege tax of three per cent of the total of his gross sales of tangible personal property, admissions, and rentals, and such person or dealer shall add three per cent to the price, rental or admissions and collect the total sum from the purchaser, admittee, lessee or consumer. That notwithstanding the rate of taxes imposed upon the privilege of sales, admissions and rentals, and in order to avoid fractions of pennies, the following brackets shall be applicable to such taxable transactions:

(a) On single sales of less than eleven cents no tax shall be added.

(b) On single sales in amounts from eleven cents to thirty-five cents, both inclusive, one cent shall be added for taxes.

(c) On sales in amounts from thirty-six cents to sixty-five cents, both inclusive, two cents shall be added for taxes.

(d) On sales in amounts from sixty-six cents to one dollar, both inclusive, three cents shall be added for taxes.

(e) On sales in amounts of more than one dollar, three per cent shall be charged upon each dollar of price, plus the above bracket charges upon any fractional part of a dollar in excess of even dollars.

Single sales are to be considered as the total sales of tangible personal property, admissions, or rentals made to a customer or combination of customers at any one time, inclusive of total sales made on any one visit to a place of sale. Place of sale shall be taken to mean a store or other place of business where property taxed hereunder is offered for sale at retail, or where stores are arranged in departments, at any one department. The comptroller may by rules and regulations not inconsistent with this chapter, further define single sales for the purpose of enforcement of uniformity in tax collections hereunder.

(11) It is hereby declared to be the legislative intent, that wherever in the construction, administration or enforcement of this chapter there may be any question respecting a duplication of the tax, that the end consumer, or last retail sale shall be the sale intended to be taxed and in so far as may be practicable there be no duplication or pyramiding of the tax.

(12) In order to aid the administration and enforcement of the provisions of this chapter with respect to the rentals,

each lessor of any hotel, apartment house, rooming house, tourist or trailer camp, or any interest therein, or any portion thereof, inclusive of owners, property managers, lessors, landlords, hotel, apartment house and rooming house operators and all licensed real estate agents within the state leasing or renting such property, shall be required to keep a record of each and every such lease and/or rental transaction which is taxable under this chapter, in such a manner and upon such forms as the comptroller may prescribe, and to report such transaction to the comptroller, or his designated agents, and to maintain such records for a period of not less than two years, subject to the inspection of the comptroller and his agents; and failure of such owner, property manager, lessor, landlord, hotel, apartment house, rooming house, tourist or trailer camp operator, or real estate agent to keep and maintain such records and to make such reports upon the forms and in the manner prescribed, shall be deemed to be a misdemeanor and upon conviction, such owner, property manager, lessor, landlord, hotel, apartment, rooming house, tourist or trailer camp operator, receiver of rent, property manager or real estate agent shall be subject to a fine of not less than fifty dollars, nor more than two hundred dollars or imprisonment in the county jail for not less than ten days nor more than thirty days, or both, for the first offense; and for subsequent offenses, they shall each be subject to a fine of not more than five hundred dollars and by imprisonment in the county jail of not more than six months, or by both such fine and imprisonment.

212.13 Records required to be kept; power to inspect.—

(1) For the purpose of enforcing the collection of the tax levied by this chapter, the comptroller is hereby specifically authorized and empowered to examine at all reasonable hours the books, records; and other documents of all transportation companies, agencies, or firms that conduct

their business by truck, rail, water, aircraft, or otherwise, in order to determine what dealers, or other persons charged with the duty to report or pay a tax under this chapter, are importing or are otherwise shipping in articles of tangible personal property which are liable for said tax. In the event said transportation company, agency or firm shall refuse to permit such examination of its books, records, or other documents by the comptroller as aforesaid, it shall be deemed guilty of a misdemeanor punishable by a fine of not less than fifty nor more than five hundred dollars; provided further, that the comptroller shall have the right to proceed in any chancery court to seek a mandatory injunction or other appropriate remedy to enforce his right against the offender as granted by this section, to require an examination of the books and records of such transportation company or carrier.

(2) Each dealer, as defined in this chapter, shall secure, maintain, and keep for a period of two years a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased or rented within this state by said dealer together with invoices, bills of lading, gross receipts from such sales and other pertinent records and papers as may be required by the comptroller for the reasonable administration of this chapter, and all such records shall be open for inspection to the comptroller at all reasonable hours. Any dealer subject to the provisions of this chapter who shall violate these provisions shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the general law.

(3) For the purpose of enforcement of this chapter, every manufacturer and seller of tangible personal property licensed within this state is required to permit the comptroller to examine their books and records at all reasonable hours, and upon their refusal the comptroller may require them to permit such examination by resort to the

circuit courts of this state, subject however to the right of removal of the cause to the judicial circuit wherein such person's business is located or wherein such person's books and records are kept, provided further that such person's books and records are kept within the state.

(4) For the further purpose of enforcement of this chapter every wholesaler of tangible personal property licensed within this state is required to permit the comptroller to examine their books and records at all reasonable hours. They must also maintain such books, and records, for a period of not less than twelve months, in order to disclose the sales of all goods sold, and to whom sold, and also the amount of items sold, in such form and in such manner as the comptroller may reasonably require, and so as to permit the comptroller to determine the volume of goods sold by wholesalers to dealers, as defined under this chapter, and the dates and amount of sales made. The comptroller may require any manufacturer or wholesaler who refuses to keep such records or to permit such inspection through the circuit courts of Florida to submit to such inspection, subject however to the right of removal of the cause as hereinbefore provided in this section.

212.14 Comptroller's powers; hearings, subpoena; distress warrants.—

(1) Any person required to pay a tax imposed under this chapter, or to make a return, either or both, and who renders a return or makes a payment of a tax with intent to deceive or defraud the state, and to prevent the state from collecting the amount of taxes imposed by this chapter, or otherwise fails to comply with the provisions of this chapter for the taxable period for which any return is made, or any tax is paid, or any report is made to the comptroller, may be required by the comptroller to show cause before the comptroller, or his designated agents, at

a time and place to be set by the comptroller; after ten days' notice in writing requiring such books, records or papers as the comptroller may require relating to the business of such person for such tax period, and the comptroller may require such person, or persons, or their employee or employees to give testimony under oath and answer interrogatories by the comptroller, or his assistant, respecting the sale, use, consumption, distribution or storage rental of real or personal property within the state, or admissions collected therein, or the failure to make a true report thereof, as provided by this chapter, or failure to pay the true amount of the tax required to be paid under this chapter. At said hearing, in the event such person fails to produce such books, records or papers, or to appear and answer questions within the scope and investigation relating to matters concerning taxes to be imposed under this chapter, or prevents or impedes his or her agents or employees from giving testimony, then the comptroller is authorized under this chapter to estimate any unpaid deficiencies in taxes to be assessed against such person upon such information as may be available to him and to issue a distress warrant for the collection of such taxes, interest or penalties estimated by him to be due and payable, and such assessment shall be deemed *prima facie* correct. In such cases said warrant shall be issued to any sheriff in the state where such person owns or possesses any property and such property as may be required to satisfy any such taxes, interest or penalties shall be by such sheriff seized and sold under said distress warrant in the same manner as property is permitted to be seized and sold under distress warrants issued to secure the payments of delinquent taxes as hereinafter provided, however, that respecting the place for the holding of a hearing, by the comptroller or his agents, as provided in this section, the person whose tax return or report being investigated, may by written request to the comptroller require the hearing be set at a place

within the judicial circuit of Florida wherein the person's business is located, or within the judicial circuit of Florida wherein such person's books and records are kept.

(2) Wherever returns are required to be made to the comptroller hereunder the full amount of the taxes required to be paid as shown by said return shall be paid and accompany said return, and the failure to remit said full amount of taxes at the time of making said return shall cause said taxes to become delinquent. All taxes and all interest and penalties imposed under this chapter shall be paid to the comptroller at Tallahassee, or to such designated offices throughout the state as the comptroller may from time to time designate and in the form of remittance required by him.

(3) The comptroller may require all reports of taxes to be paid under this chapter to be accompanied with a written statement, of the person or by an officer of any firm or corporation required to pay such taxes, setting forth such facts as the comptroller may reasonably require in order to advise the comptroller as to the amount of taxes that are due and payable upon said return. Any person or any duly authorized corporation officer or agent, members of any firm or incorporated society, or organization who refuses to make a return as required by the comptroller and in the manner and in the form that the comptroller may require or to state in writing that the return is correct to the best of his knowledge and belief, as so required by the comptroller, shall upon conviction be deemed guilty of a misdemeanor and shall be punished accordingly. The signing of a written return shall have the same legal effect as if made under oath without the necessity of appending such oath thereto.

(4) In all cases where it is necessary to insure compliance with the provisions of this chapter the comptroller shall require a cash deposit, bond, or other security as a condi-

tion to a person obtaining, or retaining, a dealer's permit under this chapter. Such bond shall be in the form and such amount as the comptroller deems appropriate under the particular circumstances. Any security required to be deposited may be sold by the comptroller at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail. If by mail, notice sent to the last known address, as the same appears in the records of the comptroller's office shall be sufficient for the purpose of this requirement. Upon such sale the surplus, if any above the amount due under this chapter, shall be returned to the person who deposited the security.

212.15. Taxes declared state funds, penalties for embezzlement; due and delinquent dates; appeals.—

(1) The taxes imposed by this chapter shall become state funds from the moment of collection, and § 812.10, relating to embezzlement by state, county or municipal officers shall apply to every person who collects any taxes imposed by this chapter.

(2) The taxes imposed by this chapter shall for each month be due to the comptroller on the first day of the succeeding month and delinquent on the twenty-first day of such month.

(3) All taxes collected under this chapter shall be remitted to the comptroller. The comptroller is empowered and it shall be his duty, when any tax becomes delinquent under this chapter, to issue a warrant for the full amount of the tax due or estimated to be due, together with the interest, penalties and cost of collection, directed to all and singular the sheriffs of the state, and mail such warrant to the sheriff of the county wherein any property of the taxpayer is located; and upon receipt of such warrant,

the sheriff shall record the same in the office of the clerk of the circuit court of said county and thereupon the amount of such warrant shall become a lien upon the title to any real or personal property of such taxpayer, situated in said county, against whom such warrant is issued in the same manner as a judgment duly docketed and recorded in the office of such clerk of the circuit court. Upon the recording of such warrant, the clerk of the circuit court shall issue execution thereon, the same as on a judgment. Such sheriff shall thereupon proceed in all respects and with like effect and in the same manner as prescribed by law and in respect to executions issued against property upon judgment of the circuit court and shall be entitled to the same fees for his services in executing the warrant to be collected. Upon payment of such execution, warrant or judgment the comptroller shall within thirty days, satisfy the lien of record and is hereby specifically authorized and directed to do so.

(4) If any taxpayer or person required by this chapter to remit taxes to the comptroller shall feel aggrieved by any action of the comptroller, he shall have the right within thirty days to appeal to the comptroller for re-hearing and re-examination and in support thereof may submit such data as may be relevant. If the comptroller's decision is determined adversely to the taxpayer or person required by this chapter to remit to the comptroller, such person shall have the right within thirty days from notice of such determination to have the comptroller's determination reviewed in appropriate proceedings in any of the circuit courts of Florida, and in such review there shall be no presumption in favor of the comptroller's findings.

212.151 Jurisdiction of suits for violation of revenue act; service on retailers, dealers or vendors not qualified to do business in state.—In all suits brought hereafter in any of the courts of this state by the comptroller against

any retailer, dealer or vendor for any violation of the Florida revenue act of 1949, such suits shall be brought thereon in the circuit courts of this state having jurisdiction of the subject matter. Every retailer, dealer or vendor not qualified to do business in this state shall designate with the comptroller an agent for service within the state for the purpose of enforcing this chapter. If a retailer, dealer or vendor has not designated or shall fail to designate with the comptroller an agent for service within the state, then the secretary of state shall be deemed the agent for service, or any agent or employee of the retailer, dealer or vendor within the state shall be deemed agent for service.

212.16 Importation of goods, permits; seizure for non-compliance, procedure, review.—

(1) For the protection of the revenue of this state, to prevent the illegal importation of tangible personal property which is subject to tax in this state, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this chapter, the comptroller is hereby authorized and empowered to put into operation, a system of permits whereby any person or dealer as defined in this chapter may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having said truck, automobile, or other means of transportation seized and subjected to legal proceedings for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property into this state, which property is subject to tax imposed by this chapter, to apply to the comptroller or his designated agent for a permit stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind of character of tangible personal property to be imported, the date, the name and address of

the consignee and such other information as the comptroller may deem proper or necessary to prevent the illegal transportation of tangible personal property into this state. Such permit shall be free of cost to the applicant and may be obtained from the comptroller or any of his designated agents.

(2) The importation into this state of tangible personal property which is subject to tax, by truck, automobile, or other means of transportation other than a common carrier without having first obtained a permit as hereinabove described (if the tax imposed by this chapter on the said tangible personal property has not been paid), shall be construed as an attempt to evade payment of the said tax and the same is hereby prohibited and the said truck, automobile or other means of transportation, other than that of common carrier, and said taxable property may be seized by the comptroller in order to secure the same as evidence in a trial and the same shall be subject to forfeiture and sale in the manner provided for in this chapter. No permit shall be required to transport personal effects of a driver, owner, or passengers of any private automobile or carrier vehicle not engaged in carrying goods for resale within the state; provided, that the comptroller may issue a regular permit (which shall be good for not more than one year) to a person to whom a dealer's certificate has been issued and who is regularly or frequently importing into the state tangible personal property in trucks owned by him in connection with his own business, requiring that reports, copies of sales documents, and other information may be filed at regular or frequent intervals with the comptroller after importation of tangible personal property subject to the tax, and the comptroller may require as a condition for the issuance of such regular permit that such person post a bond payable to the comptroller in an amount sufficient to guarantee payment of the tax on such goods as may be imported by such

person, which amount the comptroller shall set. Such permit shall be free of cost to the applicant.

(3) Subject to the above stated exception of private vehicles, any truck, automobile, or other means of transportation other than a common carrier which is used to import into this state tangible personal property which is subject to tax under this chapter, together with the contents thereof, is hereby declared to be contraband and subject to confiscation unless a permit as herein above described was first obtained. The comptroller may confiscate any such truck, automobile, or other means of transportation other than a common carrier together with its contents whenever the same is found to be importing without permit tangible personal property, the sale or use of which is taxable under this chapter.

(4) Upon seizure for confiscation, the comptroller or his representatives shall appraise the value of the vehicle and its said contents according to his best judgment and shall deliver to the person, if any found in possession of such property, a receipt showing the fact of seizure, from whom seized, the place of seizure, a description of the vehicle and contents seized. A copy of said receipt shall be filed in the office of the comptroller and shall be open to public inspection.

(5) The comptroller, or any representative of the comptroller, shall within thirty days advertise the said vehicle and its contents or other property so seized for sale to the highest bidder by one proper notice in a newspaper published in the county where the property is to be sold, if the county has such a newspaper, if there is no newspaper in such county, then by notice on the courthouse door, at least thirty days prior to the date of sale and contain a description of the vehicle and property to be sold.

(6) Any person claiming any property so seized as contraband goods, may, at any time before the sale, file

with the comptroller, at Tallahassee, a claim in writing requesting a hearing and stating his interest in the article seized. The comptroller shall set a date and place for hearing within ten days from the day the claim is filed. The comptroller is hereby empowered to subpoena witnesses and compel their attendance at the hearing authorized under this chapter. All parties to the proceeding including the person claiming such property shall have the right to have subpoenas issued by the comptroller to compel the attendance of all witnesses deemed by such parties to be necessary for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileages shall be paid as a part of the cost of the proceeding.

(7) In the event the ruling of the comptroller is favorable to the claimant, the comptroller shall deliver to the claimant the vehicle or property so seized. If the ruling of the comptroller is adverse to the claimant, the comptroller shall proceed to sell such contraband goods in accordance with the foregoing provisions of this chapter. The expense of storage and transportation, shall be adjudged as part of the cost of the proceedings in such manner as the comptroller shall fix pending any proceeding to recover a vehicle or other property seized under this chapter. The comptroller may order delivery thereof to any claimant who shall execute with one or more sureties, approved by the comptroller, and deliver to the comptroller, a bond in favor of the state for the payment of a sum double the appraised value thereof as of the time of the hearing; and providing further that if the vehicle or other property is not returned at the time of the hearing the bond shall stand in lieu of, and be forfeited in the same manner as such vehicle or other property.

(8) The action of the comptroller may be reviewed by a petition for common law writ of certiorari addressed to

the circuit court of any county wherin said hearing was held which petition shall be filed within ten days from the date the order of the comptroller is made.

(9) Immediately upon the granting of the writ of certiorari the comptroller shall cause to be made, certified, and forwarded to said court a complete transcript of the proceeding in said cause, which shall contain all the proofs submitted before the comptroller. All defendants named in the petition desiring to make defense, shall answer or otherwise plead to said petition within ten days from the date of the filing of said transcript unless the time be extended by the court.

(10) Said decision of the comptroller shall be reviewed by the circuit court solely upon the pleadings and transcript of the evidence before the comptroller, and neither party shall be entitled to introduce any additional evidence in the circuit court. The confiscated vehicle or goods shall not be sold pending such review but shall be stored by the comptroller until the final disposition of said case.

(11) Within the discretion of the comptroller, the claimant may be awarded possession of the confiscated goods pending the decision of the circuit court under the petition for certiorari, provided the claimant shall be required to execute a bond payable to the state, in an amount double the value of the property seized, the sureties to be approved by the comptroller. The condition of the bond shall be that the obligor shall pay to the state, the full value of the vehicle or goods seized unless upon certiorari the decision of the comptroller shall be reversed and the property awarded to the claimant.

(12) If no claim is interposed such vehicle, or other goods shall be forfeited without further proceedings and the same sold as hereinabove provided. The above procedure is the sole remedy of any claimant and no court

shall have jurisdiction to interfere therewith by replevin, injunction, supersedeas, or in any other manner.

(13) Any funds derived from the sale of confiscated vehicles or other goods shall be distributed or allocated in the same manner as other funds derived from the taxing statute.

212.17 Credits for returned goods, rentals or admissions; additional powers of comptroller.—

(1) In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by this chapter has been collected, or charged to the account of the consumer or used, the dealer shall be entitled to reimbursement of the amount of tax collected or charged by him, in the manner prescribed by the comptroller; and in case the tax has not been remitted by the dealer to the comptroller, the dealer may deduct the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than ninety days. The comptroller shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for such tax collected. Such memorandum shall be accepted by the comptroller at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter, provided in cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the comptroller that the tax was not due.

(2) The comptroller shall design, prepare, print and furnish to all dealers, or make available to said dealers, all necessary forms for filing returns and instructions to insure a full collection from dealers and an accounting for the taxes due, but failure of any dealer to secure such

forms shall not relieve such dealer from the payment of said tax at the time and in the manner herein provided.

(3) The comptroller and his assistants are hereby authorized and empowered to administer the oath for the purpose of enforcing and administering the provisions of this chapter.

(4) The comptroller shall have the power to make, prescribe and publish reasonable rules and regulations not inconsistent with this chapter, or the other laws, or the constitution of this state, or the United States, for the enforcement of the provisions of this chapter and the collection of revenue hereunder, and such rules and regulations shall when enforced be deemed to be reasonable and just.

(5) The comptroller, where admissions or rental payments are made and thereafter returned to the payers, after the taxes thereon have been paid, shall return or credit the taxpayer for taxes so paid on the monies returned in the same manner as is provided for returns or credits of taxes where purchases or tangible personal property are returnable to a dealer.

212.18 Administration of law; rules and regulations.—

(1) The cost of preparing and distributing the reports, forms and paraphernalia for the collection of said tax and the inspection and enforcement duties required herein shall be borne by the revenue produced by this chapter, provisions for which are hereinafter made.

(2) The comptroller shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. He is authorized to make and publish such rules and regulations not inconsistent with this chapter, as he may deem necessary in enforcing its provisions in order that there shall not be collected on

the average more than the rate levied herein. The comptroller is authorized to and he shall provide by rule and regulation a method for accomplishing this end. He shall prepare instructions to all persons required by this chapter to collect and remit the tax to guide such persons in the proper collection and remission of such tax and to instruct such persons in the practices that may be necessary for the purpose of enforcement of this chapter and the collection of the tax imposed hereby. The use of tokens in the collection of this tax is hereby expressly forbidden and prohibited.

(3) Every person desiring to engage in or conduct business as a dealer as defined in this chapter, or in leasing, renting or letting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, in this state shall file with the comptroller a certificate of registration for each place of business, show the name of the interested persons in such business, their residences, the address of the business, and such other data as the comptroller may reasonably require. Such application shall be made to the comptroller on or before thirty days after November 1, 1949, or on or before such person, firm or corporation may engage in such business, and it shall be accompanied by a registration fee of one dollar. The comptroller, upon receipt of such application will grant to the applicant, a separate certificate of registration for each place of business within the state which certificate shall not be assignable and shall be valid only for the person, firm or corporation to whom issued, and such certificate shall be placed in a conspicuous place in the business or businesses for which it is issued, and so displayed at all times. No person shall engage in business as a dealer, or in leasing, renting or letting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps,

as hereinbefore defined in this chapter, on or before thirty days after November 1, 1949, without first having obtained such a certificate, and no person shall receive any license from any authority within the state to engage in any such business after November 1, 1949, without first having obtained such a certificate. The engaging in the business of selling or leasing tangible personal property or as a dealer as defined in this chapter, or engaging in leasing, renting or letting of living quarters, sleeping or house-keeping accommodations in hotels, apartment houses, or rooming houses, or tourist or trailer camps, as hereinbefore defined in this chapter, without such certificate first had and obtained within the time limits set forth above, is hereby prohibited.

(4) The comptroller is hereby given the authority to purchase such supplies and equipment as may be necessary and incur any other necessary expenses as are proper for the enforcement and administration of this chapter.

212.19 All state agencies to cooperate in administration of law.—The state hotel and restaurant commission and the state beverage department shall, within fifteen days after November 1, 1949, supply to the comptroller a complete list of all persons, places and establishments licensed by them. The comptroller is further empowered to call on any state agency, department, bureau or board for any and all information which may, in his judgment, be of assistance in administering or preparing for the administration of this chapter, and such state agency, department, bureau or board is hereby authorized, directed and required to furnish such information.

212.20 Funds collected, disposition; additional powers of comptroller.—

(1) The comptroller shall pay over to the treasurer of the state, all funds received and collected by him under

the provisions of this chapter, to be credited to the account of the general revenue fund of the state.

(2) The comptroller is authorized to employ all necessary assistants to administer this chapter properly and is also authorized to purchase all necessary supplies and equipment which may be required for this purpose, and in order to put the chapter into effect, the sum of fifty thousand dollars, or so much thereof as is necessary, is hereby appropriated out of the general revenue fund for use by the comptroller in purchasing supplies, equipment, etc., to begin the administration of this chapter.

(3) All necessary expenses of employees to administer this chapter shall be paid in the manner provided by law applicable to expenses of other state officials and employees.

(4) In addition to all other appropriations made by law to the comptroller, there is hereby appropriated from the general revenue fund a sum not to exceed three percent of the tax collected under the provisions of this chapter to be used by the comptroller for the administration and enforcement thereof; provided, however, the provisions of this section relating to administrative expense shall become null and void and of no effect after June 30, 1951, and in no wise shall be construed as a continuing appropriation after such date.

(5) There is hereby appropriated out of the general revenue fund from the net proceeds of the tax collected under this chapter, a sum which added to all other sums appropriated by law to said fund will equal the amount of the total appropriation contained in the general appropriation act (chapter 282), as passed and enacted into law by the 1949 regular or extraordinary session of the legislature. Any surplus monies remaining in the general revenue fund from the net proceeds of the tax levied and

collected under this chapter after meeting in full the appropriations hereinabove set forth, shall be impounded in said fund and expended only under the express authority of future, regular or extraordinary sessions of the legislature.

212.21 Declaration of legislative intent.—

(1) If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of the chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable or void, portion or portions of this chapter did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective or void portions of this chapter, the legislature would have enacted the valid and constitutional portions thereof.

(2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter except as to such sale, admission, use, storage, consumption, or rental, as shall be specifically exempted therefrom, subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption or rental or any of them exempted or attempted to be exempted from the tax

or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

(3) It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses, storages, consumption or rentals in relation to or in respect of the things set forth as exempted from the tax, as may be exempted in accordance with the provisions of the constitution of the state and of the United States, and it is further declared to be the specific legislative intent to tax each and every the taxable privileges made subject to the tax or taxes or the operation of the tax or taxes, or the imposition of the tax or taxes except such sales, admissions, uses, storages, consumption or rentals as are specifically exempted therefrom, and such exemption is made only to the extent that such exemption may be made in accordance with the provisions of the constitution of the state and of the United States.

(4) It being further declared to be the specific legislative intent that in the event any exemption or attempted exemption of any sale, admissions, use, storage, consumption or rental from the tax or taxes imposed by this chapter is for any reason declared to be unconstitutional, ineffective, inapplicable or void, that then and in such event each and every such sale, admission, use, storage, consumption or rental shall be subject to the tax or taxes imposed by this chapter as fully and to the same extent as if such exemption or attempted exemption had never been included herein, it being declared to be the specific legislative intent that no unconstitutional, invalid, ineffective, inapplicable or void exemption or attempted exemption or exemptions or attempted exemptions induced the passage of this chapter,

it being further declared to be the specific legislative intent that without the inclusion herein of any such unconstitutional, invalid, ineffective, inapplicable or void exemption or attempted exemption, exemptions or attempted exemptions, the valid portions of this chapter would have been enacted; provided, however, that should the provisions, or any one or more of them, set forth in § 212.22, requiring two certain other and separate acts of the 1949 extraordinary session of the legislature to become laws as conditions precedent to this act becoming a law, for any reason be held or declared to be unconstitutional, inoperative or void, then in such event it is not intended that § 212.22 or any part thereof be separable from any of the remaining provisions of this chapter, but in such event it is expressly intended that this chapter be inseparable in its entirety.

212.22 Savings provisions.—Nothing herein contained shall be construed as repealing any general or special act authorizing a municipality to levy a special tax upon admission tickets which said tax is now being levied by such municipality.

212.23 Effective date; additional declaration of legislative intent.—It is hereby declared to be the legislative intent that this chapter is an integral part of a revenue program, which program includes, in addition to the provisions set forth in this chapter, certain aid to municipalities through another and separate act (ch. 210) designed to authorize municipalities to levy a tax up to five cents per package on cigarettes, which tax shall be collected by the state beverage director and remitted to the municipalities levying such taxes pursuant to said other act, and certain aid to counties through another and separate act (§ 208.44), designed to allocate to the several counties of the state, the proceeds of the so-called "7th Cent Gas Tax" in the manner as provided in said other

and separate act, both of which said other and separate acts are acts passed or to be passed in the 1949 extraordinary session of the legislature; and it is the legislative intent that the tax hereby levied in this chapter shall not levy unless and until the said two other and separate acts shall become law. Therefore, this chapter shall take effect November 1st, 1949, immediately after and only after the said two other and separate acts become law. Provided, however, if for any reason either of the two said other and separate acts should fail to become a law then in such event it is the declared legislative intent that this chapter shall not take effect but shall be inoperative and void.

APPENDIX B.

Final Decree of Circuit Court of Duval County, Florida.

This cause came on for final hearing before the Court upon the pleadings, the Stipulation of Fact filed herein by the parties, and upon exhibits introduced into evidence pursuant to written stipulation of the parties, and the Court having heard argument of counsel, and being fully advised in the premises, finds as follows:

1. That the plaintiff, Scripto, Inc., a corporation, as to the metal merchandise display containers shipped into the State of Florida by the plaintiff, without cost, except for the cost of merchandise contained therein, to plaintiff's jobbers in the State of Florida, and redistributed by such jobbers to retailers to be used in the State of Florida as described in Paragraph 5 of the said Stipulation of Fact, is not required by Chapter 212, Florida Statutes 1955, to collect any use tax that might be due on said metal merchandise display containers, and remit the same to the defendant, Ray E. Green, as Comptroller of the State of Florida.
2. That the plaintiff, Scripto, Inc., a corporation, is a "dealer" within the intent and meaning of said Chapter 212, Florida Statutes 1955, as to orders solicited by independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida, for the sale of merchandise by the plaintiff, under the trade name of Adgif Company, upon such orders being accepted by the plaintiff in Atlanta, Georgia, and shipped into the State of Florida by the plaintiff, for use or consumption therein, as described in said Stipulation of Fact; and the plaintiff

is required by said Chapter 212, Florida Statutes 1955, to collect the 3% use tax on said merchandise so sold by the plaintiff for use and consumption in the State of Florida, and is liable to the State of Florida for the sum of \$4,729.19 for merchandise so shipped into the State of Florida for use therein according to Paragraph 10 of said Stipulation of Fact.

3. That the requirements of said Chapter 212, Florida Statutes, 1955, that the plaintiff, as an out of state dealer, collect the use tax due the State of Florida for the use or consumption of merchandise sold by the plaintiff to Florida residents, for use and consumption as described in paragraphs 6, 7 and 8 of the said Stipulation of Fact, is a valid exercise of the taxing power of the State of Florida; is not an unreasonable burden upon interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States; and does not deprive the plaintiff of its property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and Section 12 of the Declaration of Rights of the Constitution of the State of Florida as contended by plaintiff.

It is, therefore, Ordered, Adjudged and Decreed:

(a) That the defendant, Ray E. Green, as Comptroller of the State of Florida, his agents, servants, deputies and employees be, and they are hereby permanently enjoined and restrained from collecting, or attempting to collect from the plaintiff, or requiring, or attempting to require the plaintiff, to collect any use tax that might be due the State of Florida, under the provisions of Chapter 212, Florida Statutes, 1955, on account of the plaintiff delivering to jobbers in the State of Florida, metal advertising display containers, without cost, except for the cost of the writing instruments contained therein, which are

redistributed by jobbers to retail merchants for their use within the State of Florida.

(b) That upon the plaintiff paying, or upon the defendant, Al Cahill, as Sheriff of Duval County, levying upon, attaching or distraining such of plaintiff's property as will be sufficient to pay the use tax due as described in Paragraph 2, of this decree, then the entire warrant now in the hands of the said defendant shall be deemed to be satisfied, discharged and of no further force and effect.

(c) That any and all other and further relief prayed for by plaintiff's Complaint herein, be, and the same is hereby denied.

Done and Ordered in Chambers at Jacksonville, Duval County, Florida, this 13th day of December, 1957.

s/ Charles A. Luckie,
Circuit Judge.

**Opinion and Judgment of the Supreme Court
of Florida.**

In the Supreme Court of Florida.

July Term, A. D. 1958.

Scripto, Inc., a corporation organized
and existing under the laws of the
State of Georgia,

Appellant,

vs.

Dale Carson, as Sheriff of Duval County,
Florida, and Ray E. Green, as Comptroller
of the State of Florida,

Appellees.

Case No. 29,426.
Duval County.

Opinion filed October 17, 1958.

An Appeal from the Circuit Court for Duval County,
Edwin L. Jones, Judge

Davisson F. Dunlap of Adair, Ulmer, Murchison, Kent & Ashby and George B. Haley, Jr., of Smith, Kilpatrick, Cody, Rogers and McClatchey (Atlanta, Georgia), for Appellant.

Barnes, Barnes, Naughton & Slater, for Appellees.

Thornal, J.

Appellant Scripto, Inc., which was plaintiff below, seeks reversal of a final decree adjudging it to be responsible for the collection of a Florida use tax on certain personal property. Appellees Green and Carson, who were defendants below, by cross-assignment of error challenge the correctness of the same decree relieving appellant of the respon-

sibility for collecting the use tax on another class of personal property.

Numerous points are discussed but the major question on which our ultimate judgment turns is whether by the nature of its operation in Florida the appellant Scripto, Inc., has established such jurisdictional contacts as to subject it to certain provisions of Chapter 212, Florida Statutes, the Sales and Use Tax Act.

The problems presented to the Chancellor below and tendered for disposition here arose out of two separate and distinct types of transactions. Scripto, Inc., is a Georgia corporation with its principal place of business in Atlanta. It is not qualified to do business in Florida as a non-resident corporation. It manufactures in Georgia certain writing instruments. It sells these instruments to independent jobbers and wholesalers in Florida, who in turn sell them to retail stores. Scripto employs one Florida salesman who resides in Jacksonville. He solicits orders from the wholesalers primarily by personal contact. The authority of this salesman is to solicit the orders for sale to Florida wholesalers. He forwards the orders to Scripto in Atlanta where they are reviewed for various purposes. The orders are consummated by shipment via interstate commerce f. o. b. Atlanta by common carrier or post. By this means the writing instruments are delivered to the Florida wholesalers who in turn sell them to Florida retailers for retail sales to the ultimate consumer. Scripto maintains no distributing office or other business establishment in Florida. It has no bank account or stock of merchandise or other property in Florida except the accounts owed to it by the wholesalers. In connection with sales by Scripto to Florida wholesalers for ultimate sale at retail, Scripto distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobbers. These containers subsequently serve to display the writing instruments on the

counters of the Florida retailers. No separate charge is made by Scripto for these metal display containers. The price of an assortment of mechanical writing instruments includes the display container "free." The containers are not used or consumed by the wholesaler but rather are redistributed by him, likewise without additional charge to the ultimate retailer. Scripto retains no title to the display containers nor does it in any fashion require either the wholesaler or the retail dealer to return such containers to it.

The foregoing is a summary of the factual situation which gave rise to one of the problems considered by the Chancellor. The appellee Green, as Comptroller, demanded that Scripto register as an out-of-state dealer under Section 212.06, Florida Statutes. He also demanded that Scripto collect and remit to him the three percent Florida use tax which he contended was due upon the metal display containers which Scripto furnished to the Florida wholesalers when the latter purchased an assortment of mechanical writing instruments for resale.

In order to avoid confusion we mention that we are not here concerned with any matter involving the collection of a Florida sales or use tax on these particular mechanical writing instruments. The sole question is whether under the circumstances above summarized Scripto would be required to register as a dealer and collect and remit the Florida use tax on the metal containers.

We next proceed to summarize the factual situation giving rise to the other problem considered by the Chancellor. It is this second situation which produces the major issue before us. As an entirely separate operation Scripto in Atlanta maintains a wholly owned and controlled division or department known as Adgif. Although for purposes of distinguishing the transaction which we now outline from the one summarized above we refer to

Adgif as such, it is in actuality merely Scripto, Inc., functioning through one of its own divisions. Adgif with its headquarters in Atlanta, Georgia, is in the business of selling mechanical writing instruments directly to Florida consumers. These instruments contain advertising lettering printed thereon. Adgif, of course, obtains the instruments from Scripto and ships them through interstate commerce direct to Florida customers. These customers do not purchase the writing instruments for resale but rather distribute them free of charge as a means of advertising their respective businesses. Adgif employs no salesman in Florida. The one Scripto salesman in Florida mentioned in the forepart of this opinion renders no service whatever to Adgif. He does not solicit business for them and makes no Florida contacts for them. Adgif products are solicited by some ten independent Florida brokers and commission merchants who sell the products of other manufacturers as well as those of Scripto, via Adgif. Orders for the Adgif products are solicited by these independent Florida jobbers and are mailed directly to the home office of Adgif in Atlanta for acceptance or refusal. If the order is accepted, payment therefor is made by the Florida customer directly to Adgif in Atlanta. In some instances the Florida jobber accepts a check from the customer but this check is also payable to Adgif and is forwarded with the order. The Florida independent jobbers are paid an agreed commission by Adgif for soliciting and obtaining the orders. Like its parent Scripto, Adgif maintains no salesroom or other business establishment in Florida. It has no Florida bank account or stock of merchandise or any other property in Florida except the accounts owed to it by its Florida customers. The "Adgif situation" resulted in the second problem considered by the Chancellor when the appellee Green demanded that Scripto register as an out-of-state dealer under Section 212.06, Florida Statutes. He demanded that Scripto collect and remit to him the Florida

use tax on the merchandise sold to Florida customers by Adgif pursuant to the orders taken for Adgif by Florida commission merchants.

The instant case arose when the appellee Comptroller assessed against Scripto a use tax liability in the amount of \$5,150.66, including interest and penalties for the years 1953 through 1956. Simultaneously with the assessment the appellee Comptroller issued a distress warrant in the stated amount and delivered the same to the appellee Sheriff of Duval County, Florida, for execution against the property of the appellant Scripto. The appellant Scripto promptly filed its complaint in the circuit court seeking a decree of the Chancellor declaring the entire assessment illegal and praying for an injunction against the enforcement of the distress warrant. A stipulation between the parties was submitted to the Chancellor. This stipulation reflected agreement on the facts summarized above.

By his final decree the Chancellor concluded: (1) Scripto is not responsible for the collection and remission of the Florida use tax on the metal display containers in which the mechanical writing instruments were delivered to Florida wholesalers for ultimate delivery to Florida retailers; and (2) Scripto was liable as an out-of-state dealer to collect and remit the Florida use tax on the mechanical writing instruments sold to Florida customers by Adgif through interstate commerce but pursuant to the solicitations and orders taken by Florida commission jobbers in behalf of Adgif.

Scripto has appealed from that aspect of the final decree imposing upon it the duty of collecting the use tax on the Adgif sales. The appellee Green, joined by the sheriff, has cross-assigned error from that part of the final decree holding Scripto not responsible for collecting the use tax on the metal display containers.

Appellant Scripto here contends, as it did in the lower court, that it is not responsible for the collection and remission of the Florida use tax on metal display containers because these containers are furnished to the Florida jobbers without charge; that the transaction constitutes a gift and not a purchase or else the sale is for resale in which the price of the display containers is included in the price of the assortment of writing instruments which it accompanies.

Scripto also contends that neither it nor its subsidiary Adgif is a "dealer" as to Adgif sales within the meaning of Section 212.06 (2) (g), Florida Statutes, since in their view they do not solicit Adgif business by "representatives" in the State of Florida. They buttress this contention with the further proposition that if the cited Florida Statute should be construed as comprehending Scripto under the circumstances, then it violates Article I, Section 8 (the commerce clause) and the Fourteenth Amendment of the Constitution of the United States, as well as Section 12 of the Declaration of Rights of the Florida Constitution.

The appellees here contend that the Chancellor committed error in holding Scripto not liable for the collection and remission of the Florida use tax on the metal display containers and, of course, take the position that the Chancellor ruled correctly in imposing upon Scripto the use tax liability in connection with the Adgif transactions.

Reduced to its simplest terms the nub of the controversy on the first point is whether the transaction involving the metal containers constitutes a sale to a Florida consumer requiring the collecting of a use tax. As to the Adgif transactions, the principal point is whether Scripto has established in Florida jurisdictional contacts sufficient to support the exercise of the taxing power of the state and the imposition of the requirement that Scripto function as the State's tax collector.

We point out for emphasis that we are not here concerned with the collection of the Florida **Sales Tax**. We should bear in mind that the instant case involves only an effort to collect the Florida **Use Tax**. There is, of course, a marked distinction between the two because of the nature of the imposts as well as the constitutional basis upon which the two types of taxes are grounded. A sales tax is a form of excise tax imposed on an ultimate consumer for the exercise of the privilege of purchasing property. The State's jurisdiction is supported by the proposition that the transaction takes place within the taxing forum. A use tax, which is the one here involved, is levied on the privilege of using, storing or consuming property purchased. The use tax was developed as a device to complement the sales tax in order to prevent evasion of the payment of the sales tax by the completion of purchases in a non-taxing state and shipment by interstate commerce into a taxing forum. It also evolved as a protective measure for the benefit of retail merchants in the taxing state who would be placed at a competitive disadvantage as against shipments in interstate commerce from a non-taxing state. Obviously, also the primary objective to be accomplished by these two complementary forms of taxation is to produce revenues for the operation of the government that protects the exercise of the privilege of making the purchase in one instance and of using, storing or consuming the property purchased in the other instance.

Use taxes generally have been upheld both in theory and in practice. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 Law ed. 814, 57 Sup. Ct. 524; *United States Gypsum Co. v. Green*, Florida 1958, opinion filed July 30, 1958; *Gaulden v. Kirk*, Florida 1950, 47 So. 2d 567; *Continental Supply Co. v. People*, 54 Wyo. 185, 88 P. 2d 488, 129 A. L. R. 217; *State Tax Commission v. General Trading Co.*, Iowa, 10 N. W. 2d 659, 153 A. L. R. 602.

We now devote our attention to the ruling of the Chancellor holding that Scripto, Inc., was not responsible as a

dealer for the collection and remission of the Florida use tax on the metal display containers which were delivered without any separate charge along with an assortment of mechanical writing instruments. The appellant Scripto undertakes to support the ruling of the Chancellor by referring us to Section 212.06 (1), Florida Statutes, which provides in part that the sales and use tax at the rate of "three per cent of the cost price, as of the moment of purchase, * * * shall be collectible from all dealers as herein defined * * *." Appellant points out that there must be a **purchase** by a Florida consumer before any dealer can be required to collect either the sales or use tax. In the absence of a **purchase** no tax is collectible. We are then reminded that the metal containers are delivered to the Florida wholesalers "free." There being no purchase by a Florida customer there can be no liability for the subject tax. We think the appellant properly points out that in order to justify the requirement of the collection of the use tax there must be a purchase in the sense of acquiring title for a consideration.

Appellant offers an alternative argument which appears to us to be even stronger in support of the ruling of the Chancellor and one which more nearly comports with the logic and reason of the situation. By this argument it is pointed out that the display container furnished without separate charge is a part of the assortment offered for sale and that the cost of the container is actually included in the price of the assortment. When the tax is ultimately collected by the Florida retailer on the sale of the writing instruments then he to that extent collects pro tanto the tax on the metal containers, the price of which has been included in the price paid for the writing instruments. Inasmuch as the tax, according to this argument, is actually collected by the retailer and remitted to the State in the form of a sales tax, the imposition of a use tax as urged by the appellee Comptroller would result in a duplication

of the two taxes, contrary to the provisions of Section 212.06 (4), Florida Statutes.

Referring to the factual statement covering the metal containers it will be recalled that they were furnished by appellant Scripto to Florida wholesalers for resale to Florida merchants who in turn sold the writing instruments at retail. In the view which we take of the instant matter; that is, that obviously the cost of the metal containers was included in the price paid for the merchandise assortment, then the composite assortment including writing instruments and the display container acquired by the Florida wholesaler from Scripto, Inc., was a purchase for resale within the definition of a "retail sale" under Section 212.02 (3) (a), Florida Statutes. Under these circumstances there would be no obligation on Scripto to collect and remit the use tax on the composite assortment as sold to the Florida wholesaler.

We, therefore, hold that the Chancellor ruled correctly in concluding that appellant Scripto was not obligated to register as a dealer and collect and remit the Florida use tax on the metal display containers.

The second major point involved in this appeal presents a more difficult problem. It will be recalled that in connection with the so-called Adgif transactions Scripto contends that inasmuch as it has no regular employees or business house, bank account or other property in Florida employed in effecting these sales to Florida consumers, therefore, it has no obligation under the statute to qualify as a dealer and collect and remit the Florida Use Tax. Section 212.06 (2) (g), Florida Statutes, contains one of the statutory definitions of a dealer within the contemplation of the sales and use tax law. The cited section reads as follows:

"'Dealer' also means and includes every person who solicits business either by representatives or by

the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this section from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this section may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this section have been fully complied with." (Emphasis added.)

Scripto advances the argument that it is not a dealer within the last quoted definition for the reason that in connection with Adgif sales it is not represented by any employees in the State of Florida. It appears to be appellant's position that the Florida wholesale jobbers who solicit business in Florida in behalf of the Adgif division of Scripto are not "representatives" within the contemplation of the cited statute. It may be true that these wholesalers are not regular employees of Scripto and in their representation they operate under limited contractual authority. Nevertheless, it appears to us that to the extent of the authority granted to the Florida wholesale jobbers and the services which they render to Scripto in consideration of the commissions to be paid they are representatives of Scripto for the purpose of attracting, soliciting and obtaining Florida customers for the Scripto products. Admittedly, as the result of the solicitations of these ten or more Florida wholesale jobbers, the appellant disposes of substantial volumes of its product into the Florida consumer market. To hold that these Florida wholesalers are not "representatives" of Scripto appears to us to blind ourselves to the practical realities of the relationship between the manufacturer and the wholesaler who solicits business in behalf of the manufacturer for compensation in the form of a commission and as a result of whose efforts the manufacturer is enabled to reach a consumer market

that otherwise would not be available to it. We, therefore, hold that Scripto, Inc. is a dealer within the contemplation of Section 212.06 (2) (g), Florida Statutes.

Having so held we are next confronted with the contention of the appellant that if the statute is so construed, it contravenes the commerce clause and the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Florida Constitution. In this regard appellant asserts that the imposition of the use tax against the ultimate use and consumption of its commodity after it comes to rest in Florida constitutes an undue and therefore invalid burden on interstate commerce.

It is further asserted that when the State undertakes to compel appellant Scripto to register as a dealer and collect the use tax under the factual circumstances outlined, such action by the State amounts to a taking of its property without due process.

To meet the assault suggested by the arguments last epitomized we must determine whether the representation of Scripto by the ten or more Florida wholesale commission jobbers in the solicitation of Florida customers produces a sufficient jurisdictional contact between Scripto and the State of Florida as to justify the exercise of the taxing powers by the State. We should have in mind that an aspect of the theory supporting the use tax is that it is an impost on the privilege of using personal property which might have been shipped into the State through interstate commerce but which has come to rest in the taxing forum and has become a part of the mass of property with a taxing situs. The tax is imposed on the use after transit in interstate commerce has come to an end. The levy, of course, in actuality is imposed upon and collected from the ultimate Florida consumer who as a Florida resident enjoys the use of the property because

of the opportunity afforded by the laws of the State of Florida to exercise this privilege, regardless of the source from whence the property came. We do not lose sight of the organic essential that in the imposition of a tax the lawmaking body is bound to respect jurisdictional limitations in the same fashion that a court must obtain jurisdiction in order to adjudicate the rights of litigants. However, for purposes of enforcing collection of a use tax we are not persuaded by the view that the dealer involved must necessarily be subject to the jurisdiction of the taxing forum to the extent that he would be amenable to suit in that situs. We have the view that even though a dealer is not represented in the taxing state to the extent that service of judicial process on his representative would necessarily bind him to respond in a matter in litigation; nonetheless, he can still be represented by solicitors and limited agents who contact Florida residents to the extent that jurisdictional contacts would thereby be established sufficient to support the enforced collection of the Florida use tax.

We think our position is sustained against the assault directed by the appellant by the opinion of the Supreme Court of the United States in General Trading Company, a corporation, v. State Taxing Commission of the State of Iowa, 322 U. S. 335, 64 Sup. Ct. 1028, 88 Law. ed. 1309. The factual situation in General Trading Company is almost identical to the situation presented here. The sole difference is that in the instant case the appellant was represented by commission merchants who were not on its regular payroll but who nevertheless represented Scripto pursuant to a contract that authorized the Florida merchant to solicit orders and otherwise obtain business for Scripto in Florida in return for compensation to be paid in the form of a commission. The fact that General Trading Company was represented in the taxing state by regularly employed solicitors appears to offer no dis-

tinguishing characteristic that would preclude the application of the rule of that case to the situation presented by the case at bar. In General Trading Company, *supra*, the United States Supreme Court held that there were adequate jurisdictional contacts in the State of Iowa in the person of Iowa solicitors who contacted Iowa consumers in bringing about the sale of the commodities of a Minnesota corporation to support the exercise of Iowa's jurisdiction to collect a use tax on commodities shipped into Iowa from Minnesota in fulfillment of the orders obtained by the solicitors in Iowa. This was held to constitute no unconstitutional impediment to or burden upon interstate commerce. The fact that the Minnesota corporation was required to collect the use tax for the State of Iowa was found to be no deprivation of property without due process.

We might interpolate in passing that the Florida Sales and Use Tax Law contains the customary provisions against duplication of the tax, an allowance to the dealer for making the collection, and a reciprocal credit arrangement which credits against the Florida tax any amount up to the amount of the Florida tax which might have been paid to another state. See *General Trading Company v. State Tax Commission*, *supra*.

In the instant case appellant Scripto enjoys the privilege of being represented in Florida by numerous commissioned jobbers. In advancing the business enterprise of the appellant these representatives enjoy the benefits and protection of the laws of the State of Florida. It is no answer to point out that the Florida representatives of the appellant operate and own independent businesses as commissioned jobbers. To the extent that they contact Florida consumers in the interest of advancing appellant's business and in bringing about sales of appellant's commodities to Florida customers they are just as much representatives

of the appellant under the subject statute as if they were salaried employee solicitors operating pursuant to identical limitations of contract. Bear in mind that these Florida jobbers represent appellant in Florida pursuant to specific written contracts. We are not persuaded that there is any substance to the contention that the manner in which the appellant arrives at the compensation paid to its Florida representative should distinguish this case from General Trading Company, *supra*.

We find support for the view which we here take in the opinion of the Court of Appeals of Maryland in *Topps Garment Mfg. Corp. v. State of Maryland*, 212 Md. 23, 128 A. 2d 595, where the Maryland court was confronted with practically the same factual situation presented to us by the case at bar. There, as here, the out-of-state corporation was represented in the State of Maryland only by solicitors who were furnished catalogs and order blanks but who were not on the payroll or under the supervision of the out-of-state corporation for which they solicited orders. In the interest of avoiding further lengthening this opinion we will not undertake to discuss in detail the Maryland decision last cited. It summarizes rather comprehensively practically all of the decisions of the Supreme Court of the United States and other courts on the subject of the enforced collection of a use tax on commodities sold by a non-resident corporation and shipped to a taxing state via channels in interstate commerce. Anyone considering the instant problem might profitably refer to the opinion in the case last cited. Under the almost identical factual situation the Maryland court concluded, as we do here, that the non-resident corporation was bound to collect the Maryland use tax.

We have not ignored the decision of the Supreme Court of the United States in *Miller Brothers Co. v. State of Maryland*, 347 U. S. 340, 74 Sup. Ct. 535, 98 Law Ed. 744,

relied upon with considerable confidence by the appellant. We think the Miller Brothers Co. case does not control the instant situation. There the only "jurisdictional contact" between Miller Brothers Co., a Delaware corporation, and the State of Maryland was advertising in Delaware newspapers and radio stations that reached the notice of the Maryland residents and the occasional mailing of notices to former customers in Maryland. In Miller Brothers Co. there was no actual solicitation of business in the taxing state by representatives of the Delaware corporation. The non-resident corporation maintained no representation whatsoever in the taxing state. Justifiably, it appears to us, the essential aspects of jurisdictional contact for taxing purposes were lacking.

It is, therefore, our conclusion that in holding that Scripto, Inc. is a dealer within the contemplation of Chapter 212, Florida Statutes, and that as such it should register in the State of Florida as required by that act and collect and remit to the State of Florida through its Comptroller the use tax imposed by the State on the mechanical writing instruments sold to Florida customers by Scripto, Inc. via Adgif, the Chancellor ruled correctly.

The judgment is—

Affirmed:

Terrell, C. J., Thomas, Hobson and O'Connell, J. J., concur.

In the Supreme Court of Florida.

July Term, A. D. 1958.

Friday, October 17, A. D. 1958.

Scripto, Inc., a corporation organized
and existing under the laws of the
State of Georgia,

Appellant,

vs.

Dale Carson, as Sheriff of Duval County,
Florida, and Ray E. Green, as Comptroller
of the State of Florida,

Appellees.

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected; and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellees do have and recover of and from the Appellant costs in this behalf expended, herein taxed except the \$25.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Thornal was this day ordered to be filed.

APPENDIX C.

Stipulation of Facts.

The parties to the above stated case do hereby stipulate and agree that the said case may be tried upon the following facts without further proof thereof:

1.

The plaintiff, Scripto, Inc., is a business corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at Atlanta, Georgia, and has not qualified as a foreign corporation to do business in the State of Florida.

2.

The defendant, Ray E. Green, is the duly elected Comptroller of the State of Florida and, under the provisions of Chapter 212, F. S. 1951, is the officer of this State charged with the duty of assessment and collection of all Sales and Use Taxes imposed by Chapter 212, F. S., known as "the Florida Revenue Act of 1949". That the defendant, Al Cahill, is the duly elected and constituted Sheriff of Duval County, Florida, and as such is the officer charged with the duty of executing any warrants issued by the defendant Ray E. Green, for the purpose of enforcing collection of the aforementioned taxes in the said county.

3.

The defendant Green, as Comptroller of the State of Florida, has assessed against the plaintiff a use tax under the foregoing statute and has issued a distress warrant, and the defendant Cahill, as Sheriff of Duval County, Florida, is now in the process of executing the same.

4.

The plaintiff Scripto, Inc., manufactures at its plant in Atlanta, Georgia, mechanical writing instruments which it sells to independent jobbers throughout the United States, including the State of Florida. There are approximately 150 such jobbers in the State of Florida who regularly purchase from Scripto. Some of these jobbers ship part of such Scripto merchandise to retailers without the State of Florida for ultimate retail sale or ultimate use or consumption. The matters and things hereinafter described; however, refer only to sales, use and consumption of such Scripto merchandise within the State of Florida. Since November 1, 1953, and prior to that time, Scripto, Inc., has employed a salesman who resides in Jacksonville, Florida, and who covers the entire State of Florida, soliciting orders on behalf of Scripto, Inc., from such jobbers. The sole authority of this salesman is to solicit orders of the regular Scripto line for sale to jobbers, and to forward such orders to the home office of Scripto in Atlanta, Georgia. A sample copy of the order form on which all such orders are taken is attached hereto as Exhibit "A" and made a part hereof. This salesman has no authority to accept or reject orders, to approve credits or to make collections. The orders which the salesman receives and transmits to Atlanta are reviewed by the company for the purposes, among others, of determining the availability of items ordered and approval of credit, and if the order is accepted, the order is consummated by shipment in interstate commerce, f. o. b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the jobber in Florida.

All of said sales are sales for resale in Florida, since the writing instruments purchased by the jobbers are resold by them to various retail stores, which in turn sell to the ultimate consumer. Scripto, Inc., does not have

any other employee in the State of Florida and does not own, lease, or maintain in the State of Florida any office, distributing house, salesroom, warehouse, or other place of business. It does not own or maintain in the State of Florida any bank account, any stock of merchandise or any other property.

5.

In connection with the sales described in the preceding paragraph, Scripto, Inc., distributes to such jobbers metal merchandise display containers which contain the mechanical writing instruments sold to the jobber and which also serve to display the writing instruments on the counter of the retailer. No separate charge is made by Scripto to the jobber for such display containers. A sample circular issued by Scripto, picturing the several types of such display containers and showing that no separate charge is made for the container, is attached hereto as Exhibit "B" and made a part hereof. Such display containers, like the writing instruments contained in them, are not used or consumed by the jobber but are redistributed by him with the contents intact to various retail stores in the State of Florida, where such containers are used by the retail stores to display the merchandise and replacement merchandise ordered by the retailer. A jobber pays to Scripto the same price for the same quantity of writing instruments whether or not such writing instruments are delivered in a display container. Scripto, Inc., does not retain title to such display containers nor does it require that either the jobbers or the retail dealers return such containers to Scripto.

6.

Adgif Company is a Division or Department of Scripto, Inc. It is not a separate corporation, but is wholly owned by Scripto, Inc., and that part of the business of Scripto which is hereinafter described, is operated by Scripto.

der the name of Adgif Company. Adgif has its principal office and place of business in Atlanta, Georgia, and although such office is in a different location than that of Scripto, Inc., being across the street from the Scripto office, orders received by Adgif by mail are directed to the same Post Office Box as orders by mail are directed to Scripto, Inc.

Adgif is in the business of selling mechanical writing instruments with advertising material printed thereon. Such mechanical writing instruments are obtained by Adgif from Scripto, and the manufacturer's costs for such writing instruments are charged on the books of Scripto to that part of Scripto's business operated by or under the name of Adgif Company. Customers who purchase writing instruments from Adgif do not resell such instruments, but distribute same free of charge as a means of advertising their respective businesses.

7.

The method and means of distribution of Adgif products is separate and distinct from the distribution system of Scripto, Inc., which is set out in paragraph "4" above. The regular Scripto salesman employed in Florida does not solicit orders for Adgif products, nor does he in any way aid, assist or have any connection whatsoever with Adgif sales or distribution. Adgif employs no salesman in the State of Florida. Orders for Adgif products are solicited by independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida, and such solicitors are furnished catalogs, order forms, samples, sample case and advertising material by Adgif to assist them in solicitation of orders. At the present time there are ten such independent merchants who solicit orders for Adgif products. A copy of the Contract which Scripto has with each of such merchants is attached hereto as Exhibit "C" and made a part hereof.

Orders for Adgif products solicited by such merchants are sent directly to the home office of Adgif in Atlanta for acceptance or refusal and if accepted, payment therefor is made by customer directly to Adgif on such terms and in such manner as agreed upon by the customer and Adgif Company. The independent merchant is paid an agreed commission by Adgif and the sale is consummated by shipment in interstate commerce, f. o. b. Atlanta, by delivery to common carrier or by delivery to the United States Postal Department for delivery to the Florida purchaser. Under the Memorandum of Agreement between Adgif Company and independent manufacturers' representatives, jobbers and commissioned merchants, who solicit orders for Adgif products (see Exhibit "C" attached hereto) it is contemplated that the orders taken shall be accepted by Adgif in Atlanta, Georgia, and the company reserves the right to reject any and all orders. If such jobber, commissioned merchant or independent manufacturers' representative obtains from the customer a check made out to the order of Adgif along with the Order, such check is forwarded with the order to Adgif in Atlanta. Copies of the order forms which such independent merchants use in taking orders are attached hereto as Exhibit "D" and Exhibit "D-1" (Exhibit "D-1" being part of an Adgif catalog) and made a part hereof. Among the terms and conditions of said order is the provision the "State and Federal taxes, where applicable, are to be paid by the purchaser." Adgif Company does not own, lease or maintain in the State of Florida any office, distributing house, salesroom, warehouse, or other place of business. It does not own or maintain in the State of Florida any bank account, any stock of merchandise, or any other property.

Adgif Company receives no orders for its products from consumers in the State of Florida by reason of the solicitation by the aforesaid Scripto employee who resides in

Florida and who solicits orders for Scripto products, but Adgif receives orders for its products solely by reason of the solicitation activity of the aforesaid independent merchants.

9.

On December 2, 1955, the defendant Comptroller demanded that Scripto register as an out-of-state dealer under F. S. A., Section 212.05, but Scripto has refused to register.

10.

The Comptroller has assessed against the said plaintiff, including Adgif Company, under the provisions of Chapter 212, Florida Statutes, a use tax for the period ending December 3, 1956, in the principal amount of \$3,732.37, with interest in the amount of \$485.20, and penalties in the amount of \$933.09, aggregating in all \$5,150.66. Said aggregate assessment is based on use taxes alleged by the Comptroller to be due for the years 1953, 1954, 1955 and 1956 for the use and consumption in the State of Florida of said mechanical writing instruments sold by Adgif to its customers in the State of Florida, and for the use and consumption of said metal display containers distributed by Scripto to jobbers in the State of Florida, who, in turn, distribute same to retailers for use by the retailers in displaying merchandise purchased by said retailers and contained therein at the time of distribution, and for such replacement merchandise as the said retailer might thereafter purchase from Scripto, Inc. The aggregate tax, interest and penalty claimed by the Comptroller to be due is broken down as follows:

	1953	1954	1955	1956	Interest	Penalty
Adgif Sales	\$738.98	\$966.23	\$1,086.58	\$590.16	\$445.50	\$856.74
Display Containers.....	100.72	109.09	95.61	39.70		76.35

On the 8th day of June, 1957, the said Comptroller issued a distress warrant in said aggregate amount of \$5,150.66

and delivered the same to the defendant, Al Cahill, Sheriff of Duval County, Florida, and the said last-named defendant is now in the process of executing the said distress warrant.

In Witness Whereof, the aforesaid parties, through their attorneys, have executed this Stipulation this 30th day of September, 1957.

s/ Davisson F. Dunlap,

Davisson F. Dunlap of Adair, Ulmer,
Murchison, Kent & Ashby,
1215 Barnett Bank Building,
Jacksonville, Florida,

s/ George B. Haley, Jr.,

George B. Haley, Jr., of Smith, Kilpatrick,
Cody, Rogers & McClatchey,
Hurt Building,
Atlanta 3, Georgia,

Attorneys for Plaintiff.

s/ Thomas M. Barnes,

Barnes, Barnes, Naughton & Slater,
812 Greenleaf Building,
Jacksonville, Florida,
Attorneys for Defendant, Ray E.
Green, as Comptroller for the
State of Florida.

s/ S. Perry Penland,

S. Perry Penland,
700 Atlantic Bank Building,
Jacksonville, Florida,
Attorney for Defendant, Al Cahill,
as Sheriff of Duval County.

Exhibits "A," "C," "D" and "D-1," attached to the foregoing Stipulation of Facts, are found at pages 90 through 93 in the original record.

Office-Supreme Court, U.S.
FILED
DEC 31 1959
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No. 80.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

SCRIPTO, INC.,
Appellant,

v.

DALE CARSON, as Sheriff of Duval County, Florida, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Florida.

BRIEF FOR THE APPELLANT.

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BRIEF FOR THE APPELLANT.

OPINION BELOW.

The opinion of the Supreme Court of the State of Florida is reported officially in 105 So. 2d 775. The final decree of the Circuit Court of Duval County, Florida, is not reported. The opinion of the Supreme Court of Florida (R. 30), the judgment of that court (R. 42); and the final decree of the Circuit Court of Duval County (R. 24), are printed in the record.

JURISDICTION.

This suit was brought by the appellant in the Circuit Court of Duval County, Florida, to enjoin the collection from appellant of a use tax assessed by the State Com-

troller pursuant to Chapter 212, Florida Statutes, on the ground that said statute, if construed to make appellant liable for collection of such tax, violates the commerce clause of Article I, Section 8, and the due process clause of Amendment XIV of the Constitution of the United States, and is, therefore, invalid (R. 6-7). The Circuit Court construed the statute to impose such liability on appellant, sustained the validity of the statute as thus construed and applied, and denied appellant the relief sought (R. 24-26). The Supreme Court of Florida, on October 17, 1958, affirmed the judgment of the Circuit Court, and on December 3, 1958 denied appellant's petition for rehearing (R. 42-43). Appellant, on February 28, 1959, filed in the Supreme Court of Florida its notice of appeal to the Supreme Court of the United States (R. 45). By order dated April 21, 1959, a Justice of the Supreme Court of Florida, pursuant to Rule 13 of this Court, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket, this case on appeal to the Supreme Court (R. 45). The case was docketed in this Court on May 27, 1959, and the Court noted probable jurisdiction on October 12, 1959 (R. 48).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2).

STATUTE INVOLVED.

The statute which is involved, and the validity of which, as construed and applied in this case, is challenged by appellant, is Chapter 212, Florida Statutes, known as the Florida Sales and Use Tax Law (Florida Revenue Act of 1949, as amended through the year 1956). That statute is lengthy, and it is, therefore, set out in Appendix A hereto. The opinion and judgment of the Supreme Court of Florida is based primarily upon that court's interpreta-

tion of Section 212.06 (2) (g) of that statute which requires a "dealer" to collect the use tax, and defines the term "dealer" as follows:

" 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser . . . "

QUESTIONS PRESENTED.

1. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the commerce clause, Article I, Section 8, of the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller engaged in no intrastate business or activity in connection with its sales to Florida consumers, to register as a dealer and to collect and remit a use tax to that state on merchandise sold exclusively in interstate commerce to such consumers on orders solicited by independent brokers.
2. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the due process clause of Amendment XIV to the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller to collect and remit a use tax to the State of Florida on merchandise sold to Florida consumers not by reason of any local business or activity of the seller in that state, but solely as a result of orders solicited by independent brokers who are not subject to the direction or control of the seller.

STATEMENT OF THE CASE.

A. Proceedings Below.

Appellant, a Georgia corporation with its principal office and place of business in the City of Atlanta, Georgia, brought this action in the Circuit Court of Duval County, Florida, against the Comptroller of that state and the Sheriff of that county, to enjoin a threatened attachment of certain accounts receivable of appellant for the satisfaction of use taxes which had been assessed against appellant by the Comptroller. Appellant prayed in that suit that the court would declare and decree that the assessment of such taxes against appellant by the Comptroller was illegal and invalid (R. 1, 7).

For the sake of clarification, at this point it should be noted that two separate and distinct types of transactions by appellant were involved in the state court, but only one of those transactions is involved on this appeal (R. 31). Appellant manufactures at its plant in Atlanta, Georgia, mechanical writing instruments which it sells to independent wholesalers throughout the United States, including the State of Florida. With those writing instruments, it distributes to the wholesalers a metal container to display the writing instruments for sale. Both the writing instruments and the display container are subsequently resold by the wholesaler to retail dealers who in turn retain the display container and sell the merchandise therefrom (R. 31). Such wholesalers are not the same persons as the advertising specialty brokers referred to hereinafter in connection with appellant's Adgif sales, and no question is involved on this appeal concerning the use tax consequences of any of the foregoing transactions. As a separate part of its business, appellant sells through Adgif Company, which is a division of appellant, mechanical writing instruments with advertising material printed

thereon, directly to consumers on orders solicited by independent advertising specialty brokers (R. 32). It is with respect to these Adgif sales that the validity of the Florida Sales and Use Tax Law is questioned.

In Paragraph XI of its original complaint, appellant alleged that if the Florida statute be construed and applied so as to require appellant to register as a "dealer" and to collect and remit a use tax on its Adgif sales, then the statute imposes an unreasonable burden upon interstate commerce, and deprives appellant of its property without due process of law (R. 6-7). The parties stipulated the material facts involved in the case (R. 13). The Circuit Court after consideration of the same and hearing argument thereon, on December 13, 1957, entered a final decree in which it construed the Florida statute to require appellant to register as a dealer and to collect and remit the use tax arising out of its Adgif sales, sustained the validity of the statute as thus construed and applied, and denied the prayers of appellant's complaint with respect thereto (R. 24-26).

Appellant appealed to the Supreme Court of Florida, and specifically assigned error upon the finding of the trial court in Paragraph 3 of its final decree that the Florida statute as thus construed and applied does not violate the commerce clause or the due process clause of the United States Constitution (R. 28-29). The Supreme Court of Florida, on October 17, 1958, entered its judgment affirming the judgment of the Circuit Court (R. 42), and filed its opinion in which it ruled that appellant is a "dealer" within the contemplation of Section 212.06 (2) (g), and that the Florida statute so construed does not contravene the commerce clause or the due process clause of the Constitution of the United States (R. 30, 38, 42).

Appellant, within the time provided by law, filed its petition for rehearing in the Supreme Court of Florida,

and on December 3, 1958, that court denied such petition for rehearing (R. 43). Appellant, on February 28, 1959, filed in that court its notice of appeal to the Supreme Court of the United States (R. 45).

B. The Stipulated Facts.

The material facts in this case appear in the stipulation by the parties (R. 13, et seq.). Appellant's manufacturing plant and principal office and place of business is located in Atlanta, Georgia, where it is incorporated (R. 13, 14). There it manufactures mechanical writing instruments for sale throughout the United States, including Florida (R. 14). The only sales involved in this appeal, however, are those which appellant makes through its advertising specialty division, known as Adgif Company. Adgif is not a separate corporation from appellant, but maintains a separate office in Atlanta at which it is engaged exclusively in selling mechanical writing instruments, manufactured by appellant, with advertising matter imprinted thereon (R. 15). Since Adgif sales are made to Florida residents for their use or consumption (R. 16), there is no question that Florida is entitled to tax such use. The sole question is whether appellant can be required to register as a dealer and to collect such tax, and remit it to the State of Florida.

Neither appellant nor its Adgif division has qualified as a foreign corporation to do business in the State of Florida; neither owns, leases, or maintains in that state any office, distributing house, salesroom, warehouse, or other place of business; neither owns or maintains in that state any bank account, stock of merchandise, or any other property (R. 14, 15, 17, 31, 33). Appellant employs a salesman who resides in Jacksonville, but that salesman does not solicit orders for Adgif products, nor does he in any way aid, assist or have any connection whatsoever with

Adgif sales or distribution (R. 14, 16, 32). The sole function of that salesman is to solicit orders for appellant's regular line of products which are not sold through Adgif Company, and which are sold for resale. No orders for Adgif products are received from customers in the State of Florida by reason of solicitation or other activities of that salesman (R. 17). The Circuit Court found, and the Supreme Court of Florida agreed, that the presence and activity of such salesman does not make appellant a "dealer" as to Adgif sales, as the term dealer is defined in the Florida statute, but that appellant is a "dealer" solely because of the solicitation of Adgif orders by independent brokers, as hereinafter described (R. 24, 37-38).

Appellant has no employee or agent in the State of Florida who has anything to do with Adgif sales (R. 16, 17). Orders for Adgif products are solicited by independent advertising specialty brokers (sometimes referred to by the Supreme Court of Florida as "jobbers" or "wholesalers") who are residents of Florida (R. 16). Appellant, through Adgif Company, has a written agreement with each of those brokers by which it is agreed that Adgif will pay a certain commission on all orders taken by the broker in a described territory; that Adgif reserves the right to reject any and all orders; that the broker is an independent contractor and shall not hold himself out as an employee or agent of Adgif nor make any collections nor incur any debts involving Adgif (Stip. Ex. C; R. 16, 19). The agreement requires nothing affirmative of the broker; he is not required to solicit for Adgif alone, and no specified volume of Adgif orders is required by him. The agreement contemplates no control whatever over the broker by appellant or Adgif. The broker becomes "inactive" if he has not submitted any orders for sixty days, but the only consequence of such inactivity is loss of commissions on repeat orders received directly from customers (R. 19). The Florida brokers who solicit orders for Adgif

products do in fact deal in the products of other manufacturers as well (R. 32).

Orders for Adgif products solicited by such independent brokers are sent directly to the home office of Adgif in Atlanta, Georgia, for acceptance or refusal, as provided by the terms and conditions printed on the order form (Stip. Ex. D.; R. 16, 21). If the order is accepted by Adgif, the sale is consummated by shipment of the merchandise in interstate commerce, f. o. b. Atlanta, title passing to the purchaser at that time (R. 16, 21). Payment for the merchandise is made by the customer directly to Adgif in Atlanta on such terms as may be agreed upon between them (R. 16). The broker makes no collections or deliveries for Adgif (Stip. Ex. C; R. 16, 19).

The Supreme Court of Florida agreed with appellant that the only activity in the State of Florida relevant to the power of the state to compel appellant to register and collect the use tax is the solicitation of orders for Adgif products by the independent advertising specialty brokers (R. 38). But contrary to the contentions of appellant, the court ruled that such solicitation activity made appellant a "dealer" required to collect the use tax under Section 212.06 (2) (g) of the Florida statute, and held that the statute as thus construed and applied to appellant is a valid exercise by the State of Florida of its taxing power (R. 38, 42).

SUMMARY OF ARGUMENT.

I. Construction of the Statute.

The Supreme Court of Florida ruled that appellant is a "dealer" within the meaning of the statute, not by reason of any activity of appellant or its employees in the state, but solely because independent Florida brokers solicit orders for Adgif products. That interpretation of the statute is conclusive upon this Court. **Armour Packing Company v. B. R. Lacy**, 1906, 200 U. S. 226, 26 S. Ct. 232, 50 L. ed. 451, and **State of Alabama v. King & Boozer**, 1941, 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3. Consequently, the only issue before this Court is whether the commerce clause and the due process clause protect appellant against being compelled to serve as a state tax collector for a state from which it derives no benefit or protection, and in which it is not present.

II. Commerce Clause.

A. The requirement of the Florida statute that appellant register as a dealer and perform all of the resulting duties, including collection of the use tax, as a condition precedent to its right to make interstate sales to Florida consumers, is a direct and therefore prohibited exaction on the privilege of engaging in interstate commerce. **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760. But, even if the incidence of the statute on appellant's interstate business be indirect, the statute as applied to appellant is nevertheless invalid because its burden is unreasonable in that it is not based upon any intrastate activity of appellant nor upon any need of the State of Florida to collect its taxes in this manner. See **Freeman v. Hewit**, 1946, 329 U. S. 249, 252-253, 67 S. Ct. 274, 277, 91 L. ed. 265.

B. The Florida statute by its express terms and its probable application discriminates against interstate commerce by imposing upon out-of-state sellers duties and penalties which are not imposed upon sellers who are residents of the State of Florida. **Memphis Steam Laundry Cleaner, Inc. v. Stone**, 1952, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436.

III. Due Process Clause.

The only local activity in Florida related to appellant's Adgif sales is the solicitation activity of independent advertising specialty brokers who are not directed or controlled in any way by appellant, and who solicit orders for other manufacturers as well as for appellant. Under these circumstances, there is insufficient connection between the State of Florida and appellant to give the State of Florida jurisdiction to make appellant a tax collector. **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 74 S. Ct. 535, 98 L. ed. 744.

ARGUMENT.

I.

The Construction Given the Florida Statute by the Supreme Court of That State Is Conclusive Upon and Not Subject to Review by This Court.

Both the Circuit Court and the Supreme Court of Florida held that appellant is a "dealer" within the meaning of Chapter 212, Florida Statutes, Section 212.06 (2) (g) not by reason of the presence or activity of appellant's employee-salesman, but solely because of the solicitation of Adgif orders by independent advertising specialty brokers (R. 25, 37-38). Such construction of the Florida statute by the highest court of that state is conclusive upon this Court, and presents to this Court for review the single question of whether the Florida statute as thus construed and applied is repugnant to either the commerce clause or the due process clause of the Constitution of the United States. **Armour Packing Company v. B. R. Lacy**, 1906, 200 U. S. 226, 26 S. Ct. 232, 50 L. ed. 451; **Crew Levick Company v. Commonwealth of Pennsylvania**, 1917, 245 U. S. 292, 38 S. Ct. 126, 62 L. ed. 295; **State of Wisconsin v. J. C. Penney Co.**, 1940, 311 U. S. 435, 443, 61 S. Ct. 246, 249, 85 L. ed. 267; **State of Alabama v. King & Boozer**, 1941, 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3.

II.

The Florida Statute, as Construed and Applied in This Case, Imposes a Prohibited Burden on Interstate Commerce by Requiring That Appellant Register as a Dealer, and Collect and Remit a Use Tax on Merchandise Sold Exclusively in Interstate Commerce to Florida Consumers on Orders Solicited by Independent Brokers.

A. The statute imposes a direct and unreasonable burden on the interstate business of appellant.

The Supreme Court of Florida emphasized that we are not in this case concerned with the Florida sales tax, but that the instant case involves only an effort to collect the Florida use tax (R. 35). Appellant does not dispute that statement or finding, nor does appellant question the constitutional authority of the State of Florida to tax the use by its citizens of property from whatever source such property may have been derived. Appellant does question in this case, however, the power of the State of Florida to deny to appellant its constitutional right to do interstate business, unaided by any local activity of appellant, unless it first register with the Comptroller of the State of Florida as a dealer, pay a registration fee, furnish a cash or property bond on the request of the Comptroller, collect the use tax from its customers in the State of Florida, remit the tax to the Comptroller, and subject itself to the duty to keep detailed records, and submit to periodic audit.

The Supreme Court of Florida has had some difficulty in this and in other cases in deciding what is the nature or character of its sales and use tax. In this case, the court said that "a sales tax is a form of excise tax imposed on an ultimate consumer for the exercise of the privilege of purchasing property," and that "a use tax, which is the one here involved, is levied on the privilege of using, storing or consuming property" (R. 35). In

Gaulden v. Kirk, 1950, 47 So. 2d 567, 573, the court had "no difficulty in declaring it to be the express legislative intent that this tax is a privilege or occupation tax, and the subject of taxation or the thing taxed is the privilege of engaging in business within the State of Florida." Later, in holding that a vendor is not liable to the State of Florida for sales tax receipts collected by him but stolen from him without fault on his part, the court said:

"There is an ambiguity as to whether the tax is levied on the vendor or the vendee, but it is clear that the law requires the vendor to bear the amount of the tax. The seller is required to collect it from the buyer. The buyer is liable for it. We conclude that it is a tax against the buyer. The seller is coerced to collect the tax and remit. To say that it is a tax on the seller is overcome by the fact that he is required to exact it of the purchaser. The spirit and intent of the law is that the purchaser and not the seller shall pay it." **Spencer v. Mero**, 1951, 52 So. 2d 679, 680.

Regardless, however, of whether the incidence of the Florida sales and use tax is upon the seller or the buyer, the statute is clear that the economic burden of paying either the sales tax or the use tax is to be ultimately borne by the buyer, but that the economic burden of collecting and remitting either tax is to be upon the seller, and that the statutory justification for such imposition on both the seller and the buyer is the privilege which the seller enjoys of doing business in the state, and the privilege which the purchaser enjoys of owning property in the state. Section 212.05 of the Florida Statutes declares it "to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who stores for use or consumption in this state any item or article of tangible personal property . . . For the exercise of such privilege, a tax is levied as follows: (2) At

the rate of three per cent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; . . . (5) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided. . . ."

Section 212.06 repeats the statement that the tax shall be collectible from all dealers, and then proceeds to define the term "dealer". Among the definitions of dealer is that contained in subparagraph (2) (g) of that section within which definition the court below held that appellant falls:

"'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with."

Section 212.07 again refers to the tax as a "privilege tax," and requires that dealers as far as practicable add the amount of the tax imposed under the statute to the sales price, and collect it from the purchaser; and further provides that any dealer who fails or refuses to collect the tax from the purchaser shall be liable for and pay the tax himself, and in addition shall be guilty of a misdemeanor. Section 212.12-(10) provides that "the dealer, or person charged herein, is required to pay a privilege tax of three per cent of the total of his gross sales of tangible personal property . . . and such person or dealer shall add three per cent to the price . . . and collect the

total sum from the purchaser . . . or consumer." (Emphasis added.)

Section 212.18 (3) requires that "every person desiring to engage in or conduct business as a dealer as defined in this chapter," shall apply for a certificate of registration, and that the application shall be accompanied by a registration fee of \$1.00. Engaging in business as a dealer without such certificate first had and obtained is prohibited. Section 212.14 (4) authorizes the Comptroller in his discretion to require a cash deposit, bond or other security as a condition to a person obtaining or retaining a dealer's permit, and Section 212.151 requires a seller who has not qualified to do business in the state to designate with the Comptroller an agent for service of process. Section 212.13 requires each dealer, as defined in this Chapter, to maintain detailed records of his sales for a period of two years, and provides that such records shall be open for inspection by the Comptroller at all reasonable hours.

Whatever the incidence of the use tax itself, it is clear from the foregoing statutory provisions that exactions more onerous than a tax are imposed directly on the seller for the privilege of selling tangible personalty to consumers in the state. Where a seller, like appellant, makes such sales exclusively in interstate commerce, unaided by any intrastate activity, then the burden of the exaction is directly on such interstate commerce for the privilege of engaging therein. The fact that the exaction takes not the form of a tax but the form of making appellant a tax collector is immaterial in the eyes of the commerce clause. As this Court has said, "It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself." **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 346, 74 S. Ct. 535, 539, 98 L. ed. 744. What makes the exaction invalid is not the fact that appellant must add three per cent to the cost of its products, but the "fact that there is interference

by a State with the freedom of interstate commerce." **Freeman v. Hewit**, 1946, 329 U. S. 249, 256-257, 67 S. Ct. 274, 279, 91 L. ed. 265.

The requirement of the Florida statute that appellant, as a condition precedent to the exercise of its right to sell to Florida consumers, must apply for a registration certificate, pay a registration fee, designate a process agent, possibly post a bond, and agree to act as tax collector, is precisely the sort of direct imposition or prior restraint on interstate commerce which this Court has consistently ruled invalid. **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760; **Spector Motor Service, Inc., v. O'Connor**, 1951, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573; **Railway Express Agency, Inc., v. Commonwealth of Virginia**, 1954, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757.

Even if the Court should be of the opinion, however, that the Florida statute does not impose a direct exaction on the privilege of engaging in interstate commerce, but that the burden on commerce is only indirect, the statute as applied to appellant is nevertheless invalid because its burden is unreasonable in that it is not fixed upon any intrastate activity of appellant, and is not founded upon any real need of the State of Florida. In the case of indirect or insubstantial burdens upon interstate commerce, this Court has followed a policy of weighing the deterrent effect upon commerce against the need of the state which gave rise to the tax or regulation, and against the benefits derived by the interstate business from its local activities related to its business. As the Court said in **Freeman v. Hewit**, 1946, 329 U. S. 249, 252-253, 67 S. Ct. 274, 277, 91 L. ed. 265:

"A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation

between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. . . . State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. . . ."

This Court has never held that a state has the power to burden an interstate sale with a tax, or the seller with the duty of collecting the tax, nor to reach beyond its borders to collect such tax, unless the seller is present in the state and engages in some activity there in aid of the interstate sale. In **Nelson v. Sears, Roebuck & Co.**, 1941, 312 U. S. 359, 364, 61 S. Ct. 586, 588, 589, 85 L. ed. 888, the Court upheld a state's requirement that a seller collect the use tax on both its intrastate and its interstate sales, because the seller owned retail stores in the state, had qualified to do business there, and failed to establish that there was no connection between its local retail business and its interstate sales. Cf. **Norton Co. v. Department of Revenue of Illinois**, 1951, 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517. In **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, the Court found that regular entry of the seller's employees into the taxing state to solicit orders justified imposition on the seller of the burden of collecting the use tax on sales resulting from the orders thus solicited. In those cases the seller was required to carry a burden which arose out of and was proportionate to the protection and benefit received from the state with respect to a regular, though limited, local activity of the seller.

Appellant has not qualified as a foreign corporation to do business in the State of Florida; it does not own, lease, or maintain in that state any office, distribution house,

salesroom, warehouse or other place of business; it does not own or maintain in the State of Florida any bank account, stock or merchandise or any other property. Orders for appellant's Adgif products are solicited by ten independent advertising specialty brokers who are residents of Florida. Appellant exercises no control whatever over such brokers, and they solicit orders for other manufacturers as well as for appellant. Orders for Adgif products solicited by such independent brokers are sent directly to the home office of Adgif in Atlanta, Georgia, for acceptance or refusal. If the order is accepted by Adgif, the sale is consummated by shipment of the merchandise in interstate commerce, f. o. b. Atlanta, title passing to the purchaser at that time. Payment for the merchandise is made by the customer directly to Adgif in Atlanta on such terms as may be agreed upon. The independent broker makes no collections or deliveries for Adgif. Thus, the only activity carried on in the State of Florida in connection with the Adgif sales of appellant is the activity of independent contractors, Florida businesses which may be, and presumably are, required to bear their fair share of taxes for the benefits which they derive from the state, and which may be required to collect the use tax from the Adgif customers and to remit such tax to the state. For the State of Florida to have the power to make a tax collector of appellant under these circumstances would require a compelling demonstration that such power is essential to the proper administration of the state's use tax, and that appellant's interstate business is not suppressed or unduly burdened thereby. The Court said in **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 423-424, 66 S. Ct. 586, 590, 90 L. ed. 760:

"... This is not to say that the presence of so-called local incidents is irrelevant. On the contrary, the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone;

and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce. . . ."

The State of Florida has no interest involved in the imposition of this tax collection duty on appellant which is equal or superior to the interest of appellant in being free from restraint in the pursuit of its interstate activities. The state can require the ten independent brokers who solicit orders for appellant and others to collect the use tax on sales which result from their solicitation efforts. By the terms of Section 212.06 (2) (h) of the Florida statute, it is specifically contemplated that such an independent solicitor for an out-of-state concern might be required to register as a dealer and to collect the use tax. The Comptroller has issued a regulation requiring "brokers and salesmen" to qualify as dealers, and collect the tax "unless the out-of-state company for whom they work will assume the obligation. . . ." CCH, All State Sales Tax Reporter, Par. 30-560.18. Furthermore, the consumers who purchase Adgif products are themselves Florida businesses which are required by Section 212.06 (2) (e) and (d) of the statute to pay the tax to the state if appellant is not required to do so (R. 16). Appellant's contract of sales, specifically states that state taxes "where applicable, are to be paid by the purchaser" (Stip. Ex. D; R. 21). The State of Florida will, therefore, not lose any tax or indeed be put to any significant additional cost or trouble in collecting its tax by reason of appellant's interstate immunity.

The burden on appellant, on the other hand, as the result of being required to act as a tax collector for the State of

Florida, is great. It must register as a dealer, and thus submit to the jurisdiction of the State of Florida; it must designate an agent for service of process upon it in the state; or else service of process upon the Secretary of State will be deemed to be sufficient service of process upon appellant. If appellant refuses to register as a dealer and to collect the tax, it is subjected to criminal penalties, and denied access to the courts of the state to enforce obligations owed it. If the Comptroller sees fit, he may require that appellant furnish a cash or collateral bond to guarantee the payment of the taxes which it collects. It must maintain an accounting and bookkeeping staff to keep track of use taxes collected for this and thirty-two other states; as well as for many municipalities and counties which have now resorted to such revenue measures. P-H, All States Tax Guide, Par. 92.970; CCH, All State Sales Tax Reporter, Par. 301. Rates of tax, exemptions, requirements for registration, time and manner of filing returns, record keeping and other administrative requirements vary from state to state, from locality to locality, all of which further complicates the administrative burden imposed upon appellant. Then appellant must preserve the records which it keeps, and open its books to the multitude of tax officials for review and audit. In the case of Florida, under the statute as amended in 1959, it must in addition reimburse the state for the necessary travel and per diem expense of the State Comptroller involved in making such audits. Section 212.13 (2), as amended by S. D. 923, Fla. Laws, 1959.

Appellant submits that the burden thus imposed on it as a tax collector for the State of Florida is beyond all proportion to any benefit which the State of Florida receives from requiring such tax collection by appellant, and bears no relation to any benefit which appellant receives from the State of Florida, since appellant engages in no activity in that state in connection with its Adgit sales.

B. The statute discriminates against interstate commerce.

It is the contention of the State of Florida, and the general theory of use taxation, that the use tax is a "protective measure for the benefit of retail merchants in the taxing state who would be placed at a competitive disadvantage as against shipments in interstate commerce from a non-taxing state" if the out-of-state vendor were not required to collect the tax (R. 35). In practical operation, however, the requirement that out-of-state vendors collect a use tax on their interstate sales imposes a discriminatory burden upon interstate commerce which is not imposed upon competing local business. Such discrimination is forbidden by the commerce clause. **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 423-424, 66 S. Ct. 586, 590, 90 L. ed. 760; **Memphis Steam Laundry Cleaner, Inc., v. Stone**, 1952, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436.

The Florida statute contains some provisions which are on their face discriminatory against out-of-state vendors, and other provisions which obviously in their practical application will likely prove discriminatory against such vendors. The definition of "dealer" in Section 212.06 (2) (g) of the statute, which definition was held by the Supreme Court of Florida to encompass appellant, is obviously designed to apply primarily to out-of-state vendors who sell their goods in interstate commerce. Dealers, as defined in that section, and only such dealers, are denied access to the courts of Florida to enforce obligations arising out of any sales to Florida consumers "unless it be affirmatively shown that the provisions of this chapter have been fully complied with." A local dealer who should through oversight or otherwise fail to collect the sales tax from a purchaser, or otherwise fail to comply with the statute, would simply himself be liable for the payment of the tax and incur no other penalty. But, an out-of-state vendor, as a condition precedent to maintaining an action

on a Florida account would be required to show that it had collected and remitted all use taxes on all sales made to consumers in Florida. Section 212.14 (4) gives to the Comptroller the authority to require a cash deposit, bond or other security as a condition precedent to the issuance of a dealer's permit. Obviously, the Comptroller is more likely to require such bond or deposit in the case of an out-of-state vendor who has no property, office or place of business in the State of Florida, than he is in the case of a local vendor. The statute, as amended in 1959, clearly discriminates against out-of-state vendors having no office or place of business in Florida by requiring such vendors to reimburse the state for the necessary travel and per diem required to make periodic audits of the vendor's records maintained outside the state. S. B. 923, Fla. Laws, 1959.

In summary, the Florida statute as applied to appellant is a direct exaction imposed on the privilege of engaging solely in interstate commerce. Furthermore, the burden imposed on appellant as an out-of-state vendor is not justified by any local activity or incident related to its interstate business nor by any need of the state to collect its taxes in this manner. Moreover, the statute in several respects discriminates against interstate commerce. Therefore, the statute is necessarily invalid.

III.

The Florida Statute as Construed and Applied in This Case Deprives Appellant of Its Property Without Due Process of Law by Requiring It to Collect and Remit a Use Tax to the State of Florida on Merchandise Sold to Florida Consumers Solely as the Result of Orders Solicited by Independent Brokers, and Not by Reason of Any Local Business or Activity of Appellant in That State.

The construction placed upon the Florida statute by the Supreme Court of that state authorizes the state to project

its powers beyond its boundaries and make a tax collector of a foreign corporation which is not present in the state due to ownership of any property or any business activity conducted there. It is true that the Court has held that very limited activity by a foreign corporation in a state will permit that state to subject the corporation to the jurisdiction of its courts, to impose a tax on the corporation, and to make a tax collector of the corporation, if the obligation imposed by the state arises out of or is connected with the activities of the corporation within the state. **International Shoe Company v. State of Washington**, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95; **General Trading Company v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309.

But the Court has never held that a state has jurisdiction to impose an obligation upon a foreign corporation if that corporation engages in no activity whatever in the state giving rise to the obligation. To the contrary, the Court has consistently recognized that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. ed. 744. See also **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 424, 66 S. Ct. 586, 590, 90 L. ed. 760. The Court has recently reaffirmed that for a foreign corporation be subject to the taxing jurisdiction of a state the corporation must engage in activities within the state which "form a sufficient nexus between such a tax and transactions within a state for which the tax is an exaction." **Northwestern States Portland Cement Company v. State of Minnesota**, 1959, 355 U. S. 911, 79 S. Ct. 357, 365-366, 2 L. ed. 2d 272.

In the **Miller Bros.** case, 347 U. S. 340, the Court held that even regular deliveries of a substantial quantity of merchandise by the out-of-state vendor in its own vehicles

within the taxing state was not a sufficient connection to subject the out-of-state vendor to the tax jurisdiction of the state. Appellant engages in no activity whatever in the State of Florida related to its Adgif sales. The only local activity in Florida in connection with such sales is the solicitation activity of independent advertising specialty brokers who are not directed or controlled in any way by appellant, who represent other manufacturers as well as appellant, who make no collections or deliveries, and whose sole authority is to solicit orders for appellant's products which orders are subject to acceptance or rejection by appellant at its office outside the State of Florida. This is not a case of an out-of-state vendor doing business through a general local agent who is controlled and directed by, and devotes his full time to, his principal, and who regularly makes local deliveries of his principal's merchandise, which was the situation in **Felt & Tarrant Mfg. Co. v. Gallagher**, 1939, 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488, a use tax case, and in **McGoldrick v. A. H. DuGrenier, Inc.**, 1940, 309 U. S. 70, 60 S. Ct. 404, 84 L. ed. 584, a sales tax case. In those cases, the out-of-state vendor had entered and was present in the taxing state because of the presence of the general agent who conducted the vendor's business exclusively in the state in the same manner and to the same extent as a branch office staffed by employees of the vendor would have done. The vendor in those cases had even greater jurisdictional contact with the taxing state than did the vendor in **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309.

The Congress of the United States has recently recognized by statute that for purposes of state income taxation a foreign corporation is not doing business in a state by reason of solicitation of orders there on its behalf by an independent broker. Section 101, Title I, Public Law 86-272, 73 Stat. 555 provides in part as follows:

"(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

- (1) the term 'independent contractor' means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
- (2) the term 'representative' does not include an independent contractor."

The portion of the Act of Congress above quoted is merely declaratory of existing law. This Court has consistently held that a foreign corporation is not subject to the jurisdiction of the courts of a state by reason of local activities on its behalf by a resident independent contractor, even though the resident may be a wholly owned subsidiary of the non-resident. **Bank of America v. Whitney Central National Bank**, 1923, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594; **Cannon Mfg. Co. v. Cudahy Packing Co.**, 1925, 267 U. S. 333, 45 S. Ct. 250, 69 L. ed. 634; **Consolidated Textile Corporation v. Gregory**, 1933, 289 U. S. 85, 53 S. Ct. 529, 77 L. ed. 1047. The Supreme Court of Florida has also ruled that service of process

upon a resident independent broker is not sufficient to subject one of the foreign corporations which the broker represents to the jurisdiction of the Florida courts where the foreign corporation has no resident employee or place of business, and is itself engaging in no activity in the state. **Mason et al. v. Mason Products Co.**, 1954, 67 So. 2d 762; **Atlantic & Gulf Grocery Co. v. Aetna Mills Co.**, 1919, 80 So. 738. The foregoing decisions are relevant and support appellant's position that the Florida statute is invalid as applied to appellant, because a state's jurisdiction to tax is substantially co-extensive with the jurisdiction of its courts. **International Shoe Co. v. State of Washington**, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95.

There is a real need for this Court to call a halt to the progressive tendency on the part of the various states to expand their taxing power beyond their borders through the guise of taxing a local use. At least thirty-three states and many municipalities now have use taxes. P-H, All States Tax Guide, Par. 92,973; CCH, All State Sales Tax Reporter, Par. 301. As Prentice-Hall has put it:

"Observe the progressive stages of tax collection liability. First it needed a place of business to confer jurisdiction. Then a regular agent or representative in the state, equivalent to a business place under General Trading . . . and Felt & Tarrant . . . Then other (presumably equivalent) sales activity (Maryland). This is gradually being extended, by statutory effort, to related acts like advertising for sales (Ark., D. C., Fla., Ga., Md., Miss., R. I., S. C.), sales by catalog (Fla., Ga., Md., N. D., S. C., Tenn.), and similar sales promotional activities. So, also, the act of delivery is now being seized upon by the states as a legitimate toehold (Ark., Maine, Md., Miss., R. I., Wash., W. Va.). In fact, laws in Arkansas and Maine make vehicles a 'place of business.' Even mail

order sales are in the clutch (Ark., R. I.)?" P-H, All States Tax Guide, Par. 92,970.

Encouraged by the decision of its Supreme Court in this case, the State of Florida by a 1959 amendment to Section 212.06 (2) (g) of the statute has further expanded the definition of "dealer" to include "every person who solicits business either by direct representatives, indirect representatives, manufacturers agents, or by the distribution of catalogs or other advertising matter or by any means whatsoever . . ." (Emphasized words added by S. B. 917, Fla. Laws, 1959.) The statute as thus amended would presumably require a non-resident who solicits business from Florida consumers by interstate telephone calls to register as a dealer and collect the use tax.

The states in their zeal to collect additional revenue are not only ignoring traditional concepts of jurisdiction to tax, but are prone to apply different concepts in different cases where necessary to sustain the validity of the tax. Compare **Topps Garment Manufacturing Corp. v. State of Maryland**, 1957, 212 Md. 23, 128 A. 2d 595 (Md.), with **W. J. Dickey & Sons, Inc., v. State Tax Commission of Maryland**, 1957, 212 Md. 607, 131 A. 2d 277 (Md.); also compare **People v. West Pub. Co.**, 1950, 35 C. 2d 80, 216 P. 2d 441 (Calif.), with **Irvine Co. v. McColgan**, 1945, 26 C. 2d 160, 157 P. 2d 847 (Calif.).

The case now before the Court offers an opportunity for the Court to draw the line at **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, and to tell the states plainly that beyond the minimum jurisdictional contact present in that case, i. e., solicitation of orders by employee-salesmen, they may not go without violating the commerce and due process clauses of the Constitution of the United States. Florida has clearly overstepped that line in this case.

CONCLUSION.

Chapter 212, Florida Statutes, and particularly Section 212.01 (2) (g) thereof, as construed and applied by the Supreme Court of Florida to the facts in this case, is repugnant to both the commerce clause and the due process clause of the Constitution of the United States. The judgment of the Supreme Court of Florida is, therefore, erroneous and should be reversed.

Respectfully submitted,

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APPENDIX A.

Text of Statute Involved.

Chapter 212.

Florida Statutes.

Tax on Sales, Use and Certain Transactions.

212.01 Short title.—This chapter shall be known as the "Florida revenue act of 1949" and the taxes imposed herein shall be in addition to all other taxes imposed by law.

212.02 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit, and shall include any political subdivision, municipality, state agency, bureau or department, and the plural as well as the singular number.

(2) "Sale" mean (a) any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and (b) shall include the rental of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses or rooming houses, tourist or trailer camps, as hereinafter defined in this chapter, and (c) includes the producing, fabricating, processing, printing or imprinting of tangible per-

sonal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting, and (d) the furnishing, repairing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, repairing, or serving such tangible personal property.

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price, shall be deemed a sale.

(3) (a) "Retail sale" or a "sale at retail" means a sale to consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions that may be made in lieu of "retail sales" or "sales at retail." A resale must be in strict compliance with rules and regulations and any dealer making a sale for resale which is not in strict compliance with rules and regulations shall himself be liable for and pay the tax.

(b) The terms "retail sales," "sale at retail," "use," "storage" and "consumption" shall not include the sale, use, storage or consumption of industrial materials for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials become a component part of the finished product or are used directly and immediately dissipated in fabricating, converting or processing such materials or parts thereof, nor shall such term include materials, containers, labels, sacks or bags intended to be used one time only for packaging tangible personal property for shipment or sale.

(c) The term "gross sales" means the sum total of all retail sales of tangible personal property as defined herein, without any deduction whatsoever of any kind or character, except as provided in this chapter.

(4) "Sales price" means the total amount for which tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses, or any other expense whatsoever; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing the property sold.

(5) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or services costs, transportation charges, or any expenses whatsoever.

(6) "Lease," "let," or "rental" means leasing or renting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, the same being defined as follows:

(a) Every building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are supplied for pay to transient or permanent guests or tenants, in which ten or more rooms are furnished for the accommodation of such guests, and having one or more dining rooms or cafes where meals or lunches are served to such transient or permanent guests, such sleeping accommodations and dining rooms or cafes being conducted in the same building or buildings in connection therewith, shall, for the purpose of this chapter, be deemed a hotel.

(b) Any building or part thereof, where separate accommodations for more than two families living independ-

ently of each other are supplied to transient or permanent guests or tenants, shall for the purpose of this chapter be deemed an apartment house.

(c) Every house, boat, vehicle, motor court, trailer court or other structure or any place or location kept, used, maintained, advertised or held out to the public to be a place where living quarters, sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this chapter be deemed a rooming house.

(d) In all hotels, apartment houses and rooming houses within the meaning of this chapter, the parlor, dining room, sleeping porches, kitchen, office and sample rooms shall be construed to mean rooms.

(e) A tourist camp is a place where two or more tents, tent houses or camp cottages are located and offered by a person or municipality for sleeping or eating accommodations, most generally to the transient public for either a direct money consideration or an indirect benefit to the lessor or owner in connection with a related business. A trailer camp is a place where space is offered, with or without service facilities, by any persons or municipality to the public for the parking and accommodation of two or more automobile trailers which are used for lodging, for either a direct money consideration or an indirect benefit to the lessor or owner in connection with a related business, such space being hereby defined as "living quarters," and the rental price thereof shall include all service charges paid to the lessor.

(f) "Lease," "let" or "rental" also means the leasing or rental of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration, without transfer of the title of such property, except as expressly provided to the contrary herein. Provided that,

where two taxpayers, in connection with the interchange of facilities, rent or lease property, each to the other, for use in providing or furnishing any of the services mentioned in § 167.431, the term "lease" or "rental", shall mean only the net amount of rental involved.

(7) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business.

(8) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it shall not include the sale at retail of that property in the regular course of business.

(9) "Business" includes any activity engaged in by any person, or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed in this chapter to include occasional and isolated sales or transactions involving tangible personal property by a person who does not hold himself out as engaged in business, but shall include all charges of admission and all rentals and leases of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, made subject to a tax imposed by this chapter.

(10) "Retailer" means and include every person engaged in the business of making sales at retail, or for distribution, or use, or consumption, or storage to be used or consumed in this state.

(11) The term "comptroller" means and includes the comptroller of the state or his duly authorized assistants.

(12) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities, or intangibles as defined by the intangible tax law of the state nor pari-mutuel tickets sold or issued under the racing laws of the state.

(13) The term "use tax" referred to in this chapter includes the "use," the "consumption," the "distribution," and the "storage" as herein defined.

(14) The term "intoxicating" or "alcoholic beverages" referred to in this chapter includes all such beverages as are so defined or may be hereafter defined by the laws of the state.

(15) The terms "cigarettes" or "tobacco" or "tobacco products" referred to in this chapter includes all such products as are defined or may be hereafter defined by the laws of the state.

(16) The term "admissions" shall mean and include the net sum of money after deduction of any federal taxes for admitting a person or vehicle, or persons, to any place of amusement, or where there is any show, game or exhibition, and where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, and cover charges; except that in case the amount paid for admission is less than forty cents, exclusive of federal tax, no tax shall be imposed. Provided, however, that whenever the federal tax on amusement admissions becomes ten percent or less on such admissions, then the foregoing exemption on admissions of less than forty cents shall terminate beginning the first day of the first month immediately following.

212.03 Transient rentals tax; rate, procedure, enforcement, etc.

(1) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing or letting any living quarters, sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, rooming house, tourist or trailer camp, as hereinbefore defined in this chapter. For the exercise of said privilege a tax is hereby levied as follows: in the amount equal to three per cent of and on the total rental charged for such living quarters, sleeping or housekeeping accommodations by the person charging or collecting the rental; provided that such tax shall apply to hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, whether or not there be in connection with any of the same, any dining rooms, cafes or other places where meals or lunches are sold or served to guests.

(2) The tax provided for herein shall be in addition to the total amount of the rental and shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment. The owner, lessor or person receiving the rent shall remit the tax to the comptroller at the times and in the manner hereinafter provided for "dealers" to remit taxes under this chapter. The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of the tax, the making of returns, the keeping of books, records and accounts and the compliance with the rules and regulations of the comptroller in the administration of this chapter shall apply to and

be binding upon all persons who manage or operate hotels, apartment houses, rooming houses, tourist and trailer camps, and to all persons who collect or receive such rents on behalf of such owner or lessor taxable under this chapter.

(3) Where rentals are received by way of property, goods, wares, merchandise, services or other things of value, the tax shall be at the rate of three per cent of the value of said property services or other things of value.

(4) The tax levied by this section shall not apply to, be imposed upon, or collected from any person who shall reside continuously longer than six months at any one hotel, apartment house, rooming house, tourist or trailer camp, and shall have paid the tax levied by this section for six months of residence in any one hotel, rooming house, apartment house, tourist or trailer camp.

(7) The tax imposed by this section shall constitute a lien on the property of the lessee or rentee of any sleeping accommodations in the same manner as and shall be collectible as are liens authorized and imposed by §§ 85.19 and 85.20.

(8) For the purposes of this section, six months shall mean: one hundred and eighty consecutive days.

212.04 Admissions tax; rate; procedure, enforcement etc.—It is hereby declared to be the legislative intent that every person exercising a taxable privilege who sells or receives anything of value, by way of admissions and that every person who sells admissions to any place of amusement, or for the privilege of entering or staying in any place of amusement, inclusive of admissions to theatres, outdoor theatres, shows, exhibitions, games, races and any place where charge is made through any selling of tickets, gate charges, seat charges, box charges, season pass

charges, and cover charges or receipts of anything of value measured on an admission or length of stay, or seat box accommodations, in any place of business or where there is any exhibition or entertainment, shall be subject to a tax for the exercise of such privilege. Provided, however, that no municipality of the state shall hereafter levy an excise tax on amusement admissions. For the exercise of said privilege a tax is levied as follows:

(1) At the rate of three per cent of sales price or the actual value received for such admissions, the said three per cent to be added and collected with all such admissions from the purchaser thereof, and such tax shall be paid for the exercise of the privilege as defined in the preceding paragraph.

(2) The sale price or actual value of admission shall, for the purpose of this chapter, be that price remaining after deduction of federal taxes, if any, imposed upon said admission; except that in case the amount paid for admission is less than forty cents, exclusive of federal tax, no tax shall be imposed; provided, however, that whenever the existing federal tax on admissions becomes ten percent or less then the exemptions applying to admissions of less than forty cents shall terminate beginning the first day of the month immediately following. There shall also be exempted all admissions to places of amusement operating under the supervision of the state racing commission.

(3) Such taxes shall be paid and remitted at the same time and in the same manner as provided for remitting taxes on sales of tangible personal property, as herein-after provided.

(4) Each person who, after November 1, 1949, exercises the privilege of charging admission taxes, as herein de-

defined, shall apply for and at that time shall furnish the information and comply with the provisions of § 212.18, not inconsistent herewith, and receive from the comptroller a certificate of right to exercise such privilege, which certificate shall apply to each place of business where such privilege is exercised, and shall be in the manner and form prescribed by the comptroller. Such certificate shall be issued upon payment to the comptroller of a registration fee of one dollar by the applicant. The county tax collectors are hereby made the agents of the comptroller for the purpose of issuing such certificates within the respective counties and upon application they shall issue such certificate, the county tax collector shall forward a copy of each of the same to the comptroller. Each person exercising the privilege of charging such admission taxes as herein defined shall cause such records and accounts showing the admission which shall be in the form as the comptroller may from time to time prescribe inclusive of records of all tickets numbered and issued for a period of not less than two years, and inclusive of all bills or checks of customers who are charged any of the taxes defined herein, showing the charge made to each for a period of not less than two years. The comptroller shall be empowered to use each and every one of the powers granted herein to the comptroller to discover the amount of tax to be paid by each such person, and to enforce the payment thereof as are hereby granted the comptroller for the discovery and enforcement of the payment of taxes hereinafter levied on the sales of tangible personal property. The failure of any person to pay such taxes before the twenty-first day of the succeeding month after the same are collected shall render such person liable to the same penalties that are hereafter imposed upon such person for being delinquent in the payment of taxes imposed upon the sales of tangible personal property and the failure of any person to render returns and to pay taxes as prescribed herein shall render such person sub-

ject to the same penalties, by way of charges for delinquencies, at the rate of five per cent per month for the total amount of tax delinquent up to a total of twenty-five per cent of such tax, and at the rate of fifty per cent penalty for attempted evasion of payment of any such tax, or for any attempt to file false or misleading returns that are required to be filed by the comptroller.

(5) All of the provisions of this chapter relating to collection, investigation, discovery and aids to collection of taxes upon sales of tangible personal property shall likewise apply to all privileges described or referred to in this section, and the obligations imposed in this chapter upon "retailers" are hereby imposed upon the seller of such admissions. Where tickets or admissions are sold and not used but returned and credited by the seller, the seller may apply to the comptroller for a credit allowance for such returned tickets or admissions where advance payments have been made by the buyer and have been returned by the seller upon such form and in such manner as the comptroller may from time to time prescribe, and the comptroller may upon obtaining satisfactory proof of the refunds on the part of the seller credit the seller for taxes paid upon admissions that have been returned unused to the purchaser of those admissions. The seller of admissions upon the payment of the taxes before they become delinquent and the rendering of the returns in accordance with the requirement of the comptroller, and as provided in this law, shall be entitled to a discount of three per cent of the amount of taxes upon the payment of the same before the same become delinquent, in the same manner as permitted the sellers of tangible personal property in this chapter.

(6) Admission taxes required to be paid by this chapter shall be paid to the comptroller by the owner or the collector of such admission, and where any place of business is sold or transferred by any owner, or owners, thereof,

wherein such admission taxes have or are accruing shall be obligated before such sale becomes effective to notify the comptroller of such pending sale and secure from the comptroller a permit as prescribed in this section, and the purchaser shall become obligated to withhold from the sales price such sum of money as will safely be required to discharge all accrued admission taxes upon such places of business, and that upon the failure of any such purchaser or purchasers shall become obligated to pay all accrued admission taxes, and the same shall become a lien upon all the purchaser's assets until the same shall have been paid and fully discharged.

(7) That the taxes under this section shall become a lien upon the assets of the owner of any business exercising the privilege of selling admissions, and the collection of such admissions, as defined hereunder, and shall remain a lien until fully paid and discharged, and such lien may be enforced in the manner provided hereinafter for the enforcement of the collection of taxes imposed upon the sales of tangible personal property.

(8) The word "owners" as used in this law shall be taken to include and mean all persons obligated to collect and pay over to the state the tax imposed under this section, inclusive of all holders of permits issued as herein provided, and wherever the words "owner" or "owners" are used herein it shall be taken to mean and include all persons liable for such admission taxes unless and except it appear from the context that the words are descriptive of property owners.

212.05 Sales, storage, use tax.—It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable

under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state. For the exercise of said privilege a tax is levied as follows:

(1) At the rate of three per cent of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax may be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of three per cent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(3) At the rate of three per cent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, except the rental of motion picture film, where the lease or rental of such property is an established business or part of an established business, or the same is incidental or germane to said business.

(4) At the rate of three per cent of the lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.

(5) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(6) The tax so levied is and shall be in addition to all other taxes, whether levied in the form of excise, license or privilege taxes, and shall be in addition to all other fees and taxes levied.

212.06 Same; collectible, from dealers; dealers defined; dealers to collect from purchasers; legislative intent as to scope of tax.—

(1) The aforesaid tax at the rate of three per cent of the retail sales price, as of the moment of sale, or three per cent of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution and the storage for use or consumption in this state, of tangible personal property.

(2) (a) The term "dealer" as used in this chapter shall include every person, as used in this chapter, who manufactures or produces tangible personal property for sale at retail, for use, consumption, or distribution, or for storage to be used or consumed in this state.

(b) The term "dealer" is further defined to mean every person, as used in this chapter, who imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

(c) The term "dealer" is further defined to mean every person, as used in this chapter, who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein.

(d) The term "dealer" is further defined to mean any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property.

(e) The term "dealer" is further defined to mean any person, as used in this chapter, who leases or rents tangible personal property, as defined in this chapter, for a consideration; permitting the use or possession of said property without transferring title thereto, except as expressly provided for to the contrary herein.

(f) The term "dealer" is further defined to mean any person as used in this chapter, who maintains or has within this state, directly or by a subsidiary, an office, distributing house, salesroom, or house, warehouse or other place of business.

(g) "Dealer" also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with.

(h) "Dealer" also means and includes every person who, as a representative, agent, or solicitor, of an out-of-state principal or principals, solicits, receives and accepts orders from consumers in the state for future delivery and whose principal refuses to register as a dealer.

(3) Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, or use or other consumption, in this state, shall at the time of making sales, collect the tax imposed by this chapter from the purchaser.

(4) On all tangible personal property imported or caused to be imported from other states, territories, the District of Columbia, or any foreign country, and used by him, the

"dealer" as herein defined, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(5) It is not the intention of this chapter to levy a tax upon tangible personal property imported, produced or manufactured in this state for export, provided that tangible personal property shall not be considered as being imported, produced or manufactured for export unless the importer, producer or manufacturer delivers the same to a licensed exporter for exporting, or to a common carrier for shipment outside the state or mails the same by United States mail to a destination outside the state; nor is it the intention of this chapter to levy a tax on radio broadcasting, or any sale which the state is prohibited from taxing under the constitution or laws of the United States.

(6) It is, however, the intention of this chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass property of this state.

(7) The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another state, the proof of payment of such tax to be accord-

ing to rules and regulations made by the comptroller. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the ~~comptroller~~ an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this chapter:

(8) It is further specifically provided that the "use tax" shall not apply to tangible personal property owned or acquired in this state, or imported into this state or held or stored in this state prior to November 1, 1949. But the "use tax" will apply to all tangible personal property imported or caused to be imported into this state on or after November 1, 1949, unless it appears that said property has previously borne a sales or use tax in another state equal to or greater than the tax imposed by this chapter.

(9) The taxes imposed by this chapter shall not apply to the use, sale or distribution of religious publications, Bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices and like church service and ceremonial raiments and equipment.

212.07 Same; tax added to purchase price; dealer not to absorb; penalties; general exemptions.—

(1) The privilege tax herein levied, measured by retail sales shall be collected by the dealers from the purchaser or consumer.

(2) Dealers shall, as far as practicable, add the amounts of the tax imposed under this chapter to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees, of tangible personal property

which is subject to the tax imposed by this chapter, shall be liable for and pay the tax himself.

(3) Any dealer who shall fail, neglect or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one hundred dollars or imprisonment in the county jail for not more than three months, or both, in the discretion of the court.

(4) A person engaged in any business taxable under this chapter shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred fifty dollars, or imprisonment in the county jail for not exceeding three months, or both, in the discretion of the court. For a second or subsequent offense, the penalty shall be double.

(5) The gross proceeds derived from the sale in this state of livestock, poultry and other farm products, direct from the farm are exempted from the tax levied by this chapter, provided that such sales are made directly by the producers. The producers shall be entitled to such exemptions although said livestock so sold in this state may have been registered with a breeders or registry association prior to said sale and although said sale takes place at a livestock show or race meeting, so long as said sale is made by the original producer and within this state. When sales of livestock, poultry or other farm products are made to consumers by any person, as defined herein,

other than a producer, they are not exempt from the tax imposed by this chapter.

(6) It is specifically provided that the "use tax" as defined herein shall not apply to livestock and livestock products, to poultry and poultry products, to farm and agricultural products, when produced by the farmer and used by him and members of his family and his employees on the farm.

(7) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to any other person who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempted from any and all provisions of this chapter, including payment of the tax applicable to the sale, storage, use, transfer or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one tax be exacted.

(8) The term "agricultural commodity," for the purposes hereof, shall mean horticultural, poultry and farm products, and livestock and livestock products.

212.08 Same; specific exemptions.—The sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of the following tangible personal property is hereby specifically exempt from the tax imposed by this chapter.

(1) General groceries, including particularly, food and food products, milk, butter, eggs, meats (fresh, salt and cured), flour, meal, cereals, bread, vegetables and vegetable juices, fruit and fruit juices, canned foods (not including

gum and soft drinks, or articles that are not edible), also candy where the price at which the same is sold is twenty-five cents or less. "Food products" as used herein shall mean and include cereal and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, fruit and fruit products, spices, salt and sugar, coffee and coffee substitutes, teas and coca, condiments, relishes, spreads, shortening and flavoring, and also bakery products; but shall not include meals, packaged lunches or sandwiches prepared or sold in or by restaurants, drug stores, lunch counters, cafeterias, hotels, or other-like places of business, or by any business or place licensed by the hotel and restaurant commission of the state.

(2) There shall be exempt from so much of the tax imposed by this chapter as shall exceed three hundred dollars on the sale, use, storage or other consumption in this State of machines and equipment and parts therefor used in farming, mining, quarrying, compounding, processing, producing or manufacturing of tangible personal property for sale, or used in furnishing communication or transportation services, provided that the term "machines and equipment and parts therefor" as used herein, shall mean only any machines and equipment and parts therefor which are specifically designed and used for farming, mining, quarrying, compounding, processing, producing, manufacturing, storing or refrigerating tangible personal property, or used in furnishing communication or transportation services. The comptroller is hereby authorized to promulgate rules and regulations not inconsistent with this section further defining "machines and equipment and parts therefor" for the purpose of enforcement of uniformity in tax collections hereunder.

(3) There shall also be exempted all sales made to the United States government, the state or any county, municipality, or political subdivision of this state and in,

cluding sales or tangible personal property made to contractors employed by any such government or political subdivision thereof where such tangible personal property goes into and becomes a part of public works owned by such government or political subdivision thereof. Also exempted are vehicles and vessels and parts thereof used to transport passengers or property in interstate and foreign commerce.

(4) (a) Also exempted from the tax imposed by this chapter are fuels (including crude oil, fuel oil, gasoline, kerosene, lubricating oil, diesel oil, coal, coke and cord-wood), motor vehicles and motor-propelled agricultural equipment (not including parts thereof when sold as separate transactions), cigarettes, alcoholic beverages, beer, water (not exempting mineral water or carbonated water), ice, medicine, compounded in a retail establishment by a pharmacist licensed by the state according to an individual prescription or prescriptions written by a practitioner of the healing arts licensed by the state, and common household medicinal remedies recommended and generally sold for the relief of pain, ailments, distress or disorders of the human body, according to a list prescribed and approved by the state board of health, which said list shall be certified to the comptroller from time to time and be included in the rules and regulations promulgated by the comptroller. Other exemptions are electric power or energy, communication services, natural, artificial or liquified petroleum gases, nets and ships used directly in and by licensed commercial fisheries, feeds, fertilizers, insecticides and fungicides used for application on crops or groves, and containers used for processing farm products and also field and garden seeds; newspapers, film rentals, school books and school lunches. Also exempted are professional, insurance or personal service transactions which involve sales as inconsequential elements for which no separate charges are made.

(b) The above exempted personal service transactions do not exempt the sale of information services, involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or other persons acting in a representative or fiduciary capacity or information services furnished to newspapers. "Information services" shall mean and include the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons.

(5) Patients, intimates and guests of any hospital, or institution designed and operated primarily for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or for any reason dependent upon special care or attention, are exempt from the tax imposed by this chapter on rentals and meals.

(6) There shall be exempt from the provisions of this chapter cheesecloth for shading tobacco and seed beds, machines and equipment used in plowing, planting, cultivating, and harvesting crops; articles sold or leased to churches or other nonprofit religious, nonprofit educational, or nonprofit charitable institutions in the course of their customary nonprofit religious, nonprofit educational, or nonprofit charitable activities; artificial eyes, limbs, crutches, eyeglasses, dentures, hearing devices, prosthetic and orthopedic appliances, funerals, when the total cost thereof is five hundred dollars or less.

(7) There shall likewise be exempt from the tax imposed by this act all charges for services rendered by radio and television stations, including advertising, line charges, talent fees or charges, and for film and transcriptions and other expendable items used in producing radio or television broadcasts.

(8) There shall likewise be exempt from the tax imposed by this chapter articles of clothing, including shoes, hats and underwear, where the price at which the same is sold is ten dollars or less, on any single item thereof; provided, that sales of articles of clothing ordinarily sold or offered for sale as a pair, or as a suit or ensemble, shall be considered single items under this exemption, provided fabrics by the yard classified as wearing apparel fabrics shall be included in the term "articles of clothing."

(9) There shall likewise be exempt from the tax on admissions levied by this chapter, all admissions to athletic contests or other sports events, not prohibited by law, the proceeds of which go entirely to the support of a hospital for crippled children, which hospital is subsidized by the Florida crippled children's commission, out of state funds; provided that, in order to qualify for such exemptions, no part of the net proceeds of such athletic contest or other sports event shall inure to the benefit of any private stockholder or individual.

212.09 Same; trade-ins deducted.—

(1) Where used articles are taken in trade, or a series of trades, as a credit or part payment on the sale of new articles, the tax levied by this chapter shall be paid on the sales price of the new article, less the credit for the used article taken in trade.

(2) Where used articles are taken in trade, or a series of trades, as a credit or part payment on the sale of used articles, the tax levied by this chapter shall be paid on the sales price of the used article less the credit for the used article taken in trade.

212.10 Sales of business; liability for tax, procedure, penalty for violation.—

(1) If any dealer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods, or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting the business; his successor, successors, or assigns, if any, shall withhold a sufficient portion of the purchase money to safely cover the account of such taxes, interest, and penalties due and unpaid until such former owner shall produce a receipt from the comptroller showing that they have been paid or a certificate stating that no taxes, interest, or penalties are due. If the purchasers of a business or stock of goods shall fail to withhold a sufficient amount of the purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accruing and unpaid on account of the operation of the business by any former owner, owners or assigns.

(2) In the event any dealer is delinquent in the payment of the tax herein provided for, the comptroller may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such dealer or owing any debt to such dealer at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make any other disposition of such credits or other personal property, or debts until the comptroller shall have consented to a transfer or disposition, or until thirty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the comptroller of any and all such credits, or other personal property or debts in their possession, under their control, or owing by them, as the case may be.

(3) Any violation of the provisions of this section shall be a misdemeanor and punishable as such.

212.11 Tax returns and regulations.—

(1) That the taxes levied hereunder upon rentals, admissions and sales of tangible personal property shall be due and payable monthly beginning on the first day of November, 1949, and for the purpose of ascertaining the amount of tax payable under this chapter, it shall be the duty of all dealers to make a return, on or before the twentieth day of the month to the comptroller, upon forms prepared and furnished by him, showing the rentals, admissions, gross sales or purchases as the case may be, arising from all leases, rentals, admissions, sales or purchases, taxable under this chapter during the preceding calendar month.

(2) Gross proceeds from rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect thereto in accordance with such rules and regulations as the comptroller may prescribe.

(3) Whenever the tax on rentals of any machine described in § 212.08, shall amount to the total tax which would have been paid on said machine had the same been a sale rather than a rental, then there shall be no further rental tax collected thereon.

(4) Except as otherwise expressly provided for herein, it is hereby declared to be the intention of this chapter to impose a tax on the gross proceeds of all leases and rentals of tangible personal property in this state where the lease or rental is a part of the regularly established business, or the same is incidental or germane thereto.

212.12 Dealer's credit for collecting tax; penalties for noncompliance; powers of comptroller in dealing with delinquents; brackets applicable to taxable transactions; records required.—

(1) For the purpose of compensating the lessor of real and personal property taxed hereunder, and for the purpose of compensating dealers in tangible personal property and for the purpose of compensating owners of places where admissions are collected, as compensation for the keeping of prescribed records and the proper accounting and remitting of taxes by them, such seller, lessor, owner and dealer shall be allowed three per cent of the amount of the tax due and accounted for and remitted to the comptroller, in the form of a deduction in submitting his report and paying the amount due by him, and the comptroller shall allow the said deduction of three per cent of the amount of the tax to the person paying the same for remitting the tax in the manner herein provided, and for paying the amount due to be paid by him provided, however, that the three per cent allowance shall not be granted nor shall any deduction be permitted where the tax is delinquent at the time of payment, or where there is a manifest failure to maintain proper records or make proper prescribed reports; and as further compensation to dealers in tangible personal property for the keeping of prescribed records and collection of taxes and remitting the same, §§ 204.03 and 204.04, relating to inventory tax be and the same are hereby repealed.

(2) When any person, firm or corporation required hereunder to make any return or to pay any tax imposed by this chapter, shall fail to make such return or shall fail to pay such tax, within the time required hereunder, in addition to all other penalties provided herein, and by the laws of Florida in respect to such taxes, the specific penalty shall be added to the tax in the amount of five

per cent if the failure is for not more than thirty days, with an additional five per cent for each additional thirty days, or fraction thereof, during the time which the failure continues, not to exceed, however, a total penalty of twenty-five per cent in the aggregate. In the case of a false or fraudulent return or a wilful intent to evade payment of any tax imposed under this chapter, in addition to the other penalties provided by law, the person making such false or fraudulent return or wilfully attempting to evade the payment of such a tax shall be liable to a specific penalty of fifty per cent of the tax bill and fine and punishment as provided by law for a conviction of a misdemeanor.

(3) When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax shall be required by law to be paid, there shall be added to the amount due interest at the rate of six per cent per annum from the date due until paid.

(4) All penalties and interest imposed by this chapter shall be payable to and collectible by the comptroller in the same manner as if they were a part of the tax imposed.

(5) The comptroller for good cause shown by written request, may extend, but not to exceed thirty days, the time for making any returns required under the provisions of this chapter, and may compromise penalties after his investigation reveals that the penalty would be too severe or unjust, but interest shall be collected.

(6) In the event any dealer, or other person charged herein, fails to make a report and pay the tax as provided by this chapter, or in case any person receiving rentals, or any dealer, owner or person charged herein with the duty to report, fails to make a report, or makes a grossly incorrect report; or makes a report that is false or fraudu-

lent, then in either such event, it shall be the duty of the comptroller to make an assessment from an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds from rentals, or the total admissions received or amounts received from leases of tangible personal property by a dealer, and an assessment from an estimate of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state of tangible personal property with interest, plus penalty, if such have accrued, and as the case may be, then the comptroller shall proceed to collect such taxes on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner or lessor as the case may be.

(7) The comptroller is given the power to prescribe the records to be kept by all persons subject to taxes imposed by this chapter and it shall be the duty of every person required to make a report and pay any tax under this chapter, and every person receiving rentals, and owners of places of admission, to keep and preserve suitable records of the sales, leases, rentals, admissions, or purchases, as the case may be, taxable under this chapter, and such other books of account as may be necessary to determine the amount of tax due hereunder, and other information as may be required by the comptroller; and it shall be the duty of every such person so charged with such duty, moreover, to keep and preserve, for a period of two years, all invoices and other records of goods, wares and merchandise, records of admissions, leases and rentals and all other subjects of taxation under this chapter; and all such books, invoices and other records shall be open to examination at all reasonable hours to the comptroller or any of his duly authorized agents.

(8) In the event the dealer has imported the tangible personal property and he fails to produce an invoice show-

ing the cost price of the articles as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the comptroller shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax thereon with interest plus penalties, if such have accrued on the true cost price as assessed by him. The assessment so made shall be considered prima facie correct, and the duty shall be on the dealer to show to the contrary.

(9) In the case of the lease or rental of tangible personal property, or other rentals as herein defined and taxed, if the consideration given or reported by the lessor, person receiving rental or dealer does not, in the judgment of the comptroller, represent the true or actual consideration, then the comptroller is authorized to ascertain the same and assess and collect the tax thereon in the same manner as above provided, with respect to imported tangible property, together with interest, plus penalties, if such have accrued.

(10) Taxes imposed by this chapter upon the privilege of the use, consumption, or storage for consumption, or sale of tangible personal property, admissions and rentals as herein taxed shall be collected upon the basis of an addition of three per cent to the total price of such admissions, rentals, or sale price of such article or articles that are purchased, sold or leased at any one time by or to a customer or buyer, and the dealer, or person charged herein, is required to pay a privilege tax of three per cent of the total of his gross sales of tangible personal property, admissions, and rentals; and such person or dealer shall add three per cent to the price, rental or admissions and collect the total sum from the purchaser, admittee, lessee or consumer. That notwithstanding the rate of taxes imposed upon the privilege of sales, admissions and rentals, and in order to avoid fractions of pennies, the following brackets shall be applicable to such taxable transactions:

- (a) On single sales of less than eleven cents no tax shall be added.
- (b) On single sales in amounts from eleven cents to thirty-five cents, both inclusive, one cent shall be added for taxes.
- (c) On sales in amounts from thirty-six cents to sixty-five cents, both inclusive, two cents shall be added for taxes.
- (d) On sales in amounts from sixty-six cents to one dollar, both inclusive, three cents shall be added for taxes.
- (e) On sales in amounts of more than one dollar, three percent shall be charged upon each dollar of price, plus the above bracket charges upon any fractional part of a dollar in excess of even dollars.

Single sales are to be considered as the total sales of tangible personal property, admissions, or rentals made to a customer or combination of customers at any one time, inclusive of total sales made on any one visit to a place of sale. Place of sale shall be taken to mean a store or other place of business where property taxed hereunder is offered for sale at retail, or where stores are arranged in departments, at any one department. The comptroller may by rules and regulations not inconsistent with this chapter, further define single sales for the purpose of enforcement of uniformity in tax collections hereunder.

(11) It is hereby declared to be the legislative intent, that wherever in the construction, administration or enforcement of this chapter there may be any question, respecting a duplication of the tax, that the end consumer, or last retail sale shall be the sale intended to be taxed and in so far as may be practicable there be no duplication or pyramiding of the tax.

(12) In order to aid the administration and enforcement of the provisions of this chapter with respect to the rentals,

each lessor of any hotel, apartment house, rooming house, tourist or trailer camp, or any interest therein, or any portion thereof, inclusive of owners, property managers, lessors, landlords, hotel, apartment house and rooming house operators and all licensed real estate agents within the state leasing or renting such property, shall be required to keep a record of each and every such lease and/or rental transaction which is taxable under this chapter, in such a manner and upon such forms as the comptroller may prescribe, and to report such transaction to the comptroller, or his designated agents, and to maintain such records for a period of not less than two years, subject to the inspection of the comptroller and his agents, and failure of such owner, property manager, lessor, landlord, hotel, apartment house, rooming house, tourist or trailer camp operator, or real estate agent to keep and maintain such records and to make such reports upon the forms and in the manner prescribed, shall be deemed to be a misdemeanor and upon conviction, such owner, property manager, lessor, landlord, hotel, apartment, rooming house, tourist or trailer camp operator, receiver of rent, property manager or real estate agent shall be subject to a fine of not less than fifty dollars, nor more than two hundred dollars or imprisonment in the county jail for not less than ten days nor more than thirty days, or both, for the first offense; and for subsequent offenses, they shall each be subject to a fine of not more than five hundred dollars and by imprisonment in the county jail of not more than six months, or by both such fine and imprisonment.

212.13 Records required to be kept; power to inspect.—

(1) For the purpose of enforcing the collection of the tax levied by this chapter, the comptroller is hereby specifically authorized and empowered to examine at all reasonable hours the books, records, and other documents of all transportation companies, agencies, or firms that conduct

their business by truck, rail, water, aircraft, or otherwise, in order to determine what dealers, or other persons charged with the duty to report or pay a tax under this chapter, are importing or are otherwise shipping in articles of tangible personal property which are liable for said tax. In the event said transportation company, agency or firm shall refuse to permit such examination of its books, records, or other documents by the comptroller as aforesaid, it shall be deemed guilty of a misdemeanor punishable by a fine of not less than fifty nor more than five hundred dollars; provided further, that the comptroller shall have the right to proceed in any chancery court to seek a mandatory injunction or other appropriate remedy to enforce his right against the offender as granted by this section, to require an examination of the books and records of such transportation company or carrier.

(2) Each dealer, as defined in this chapter, shall secure, maintain, and keep for a period of two years a complete record of tangible personal property received, used, sold at retail, distributed or stored, leased or rented within this state by said dealer together with invoices, bills of lading, gross receipts from such sales and other pertinent records and papers as may be required by the comptroller for the reasonable administration of this chapter, and all of such records shall be open for inspection to the comptroller at all reasonable hours. Any dealer subject to the provisions of this chapter who shall violate these provisions shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the general law.

(3) For the purpose of enforcement of this chapter, every manufacturer and seller of tangible personal property licensed within this state is required to permit the comptroller to examine their books and records at all reasonable hours, and upon their refusal the comptroller may require them to permit such examination by resort to the

circuit courts of this state, subject however to the right of removal of the cause to the judicial circuit wherein such person's business is located or wherein such person's books and records are kept, provided further that such person's books and records are kept within the state.

(4) For the further purpose of enforcement of this chapter every wholesaler of tangible personal property licensed within this state is required to permit the comptroller to examine their books and records at all reasonable hours. They must also maintain such books, and records, for a period of not less than twelve months, in order to disclose the sales of all goods sold, and to whom sold, and also the amount of items sold, in such form and in such manner as the comptroller may reasonably require, and so as to permit the comptroller to determine the volume of goods sold by wholesalers to dealers, as defined under this chapter, and the dates and amount of sales made. The comptroller may require any manufacturer or wholesaler who refuses to keep such records or to permit such inspection through the circuit courts of Florida to submit to such inspection, subject however to the right of removal of the cause as hereinbefore provided in this section.

212.14 Comptroller's powers; hearings, subpoena; distress warrants.—

(1) Any person required to pay a tax imposed under this chapter, or to make a return, either or both, and who renders a return or makes a payment of a tax with intent to deceive or defraud the state, and to prevent the state from collecting the amount of taxes imposed by this chapter, or otherwise fails to comply with the provisions of this chapter for the taxable period for which any return is made, or any tax is paid, or any report is made to the comptroller, may be required by the comptroller to show cause before the comptroller, or his designated agents, at

a time and place to be set by the comptroller; after ten days' notice in writing requiring such books, records or papers as the comptroller may require relating to the business of such person for such tax period, and the comptroller may require such person, or persons, or their employee or employees to give testimony under oath and answer interrogatories by the comptroller, or his assistant, respecting the sale, use, consumption, distribution or storage rental of real or personal property within the state, or admissions collected therein, or the failure to make a true report thereof, as provided by this chapter, or failure to pay the true amount of the tax required to be paid under this chapter. At said hearing, in the event such person fails to produce such books, records or papers, or to appear and answer questions within the scope and investigation relating to matters concerning taxes to be imposed under this chapter, or prevents or impedes his or her agents or employees from giving testimony, then the comptroller is authorized under this chapter to estimate any unpaid deficiencies in taxes to be assessed against such person upon such information as may be available to him and to issue a distress warrant for the collection of such taxes, interest or penalties estimated by him to be due and payable, and such assessment shall be deemed *prima facie* correct. In such cases said warrant shall be issued to any sheriff in the state where such person owns or possesses any property, and such property as may be required to satisfy any such taxes, interest or penalties shall be by such sheriff seized and sold under said distress warrant in the same manner as property is permitted to be seized and sold under distress warrants issued to secure the payments of delinquent taxes as hereinafter provided, however, that respecting the place for the holding of a hearing, by the comptroller or his agents, as provided in this section, the person whose tax return or report being investigated, may by written request to the comptroller require the hearing to be set at a place

within the judicial circuit of Florida wherein the person's business is located, or within the judicial circuit of Florida wherein such person's books and records are kept.

(2) Wherever returns are required to be made to the comptroller hereunder the full amount of the taxes required to be paid as shown by said return shall be paid and accompany said return, and the failure to remit said full amount of taxes at the time of making said return shall cause said taxes to become delinquent. All taxes and all interest and penalties imposed under this chapter shall be paid to the comptroller at Tallahassee, or to such designated offices throughout the state as the comptroller may from time to time designate and in the form of remittance required by him.

(3) The comptroller may require all reports of taxes to be paid under this chapter to be accompanied with a written statement, of the person or by an officer of any firm or corporation required to pay such taxes, setting forth such facts as the comptroller may reasonably require in order to advise the comptroller as to the amount of taxes that are due and payable upon said return. Any person or any duly authorized corporation officer or agent, members of any firm or incorporated society, or organization who refuses to make a return as required by the comptroller and in the manner and in the form that the comptroller may require or to state in writing that the return is correct to the best of his knowledge and belief, as so required by the comptroller, shall upon conviction be deemed guilty of a misdemeanor and shall be punished accordingly. The signing of a written return shall have the same legal effect as if made under oath without the necessity of appending such oath thereto.

(4) In all cases where it is necessary to insure compliance with the provisions of this chapter the comptroller shall require a cash deposit, bond, or other security as a condi-

tion to a person obtaining, or retaining, a dealer's permit under this chapter. Such bond shall be in the form and such amount as the comptroller deems appropriate under the particular circumstances. Any security required to be deposited may be sold by the comptroller at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail. If by mail, notice sent to the last known address, as the same appears in the records of the comptroller's office shall be sufficient for the purpose of this requirement. Upon such sale the surplus, if any above the amount due under this chapter, shall be returned to the person who deposited the security.

212.15 Taxes declared state funds, penalties for embezzlement; due and delinquent dates; appeals.—

- (1) The taxes imposed by this chapter shall become state funds from the moment of collection, and § 812.10, relating to embezzlement by state, county or municipal officers shall apply to every person who collects any taxes imposed by this chapter.
- (2) The taxes imposed by this chapter shall for each month be due to the comptroller on the first day of the succeeding month and delinquent on the twenty-first day of such month.

- (3) All taxes collected under this chapter shall be remitted to the comptroller. The comptroller is empowered and it shall be his duty, when any tax becomes delinquent under this chapter, to issue a warrant for the full amount of the tax due or estimated to be due, together with the interest, penalties and cost of collection, directed to all and singular the sheriffs of the state, and mail such warrant to the sheriff of the county wherein any property of the taxpayer is located; and upon receipt of such warrant,

the sheriff shall record the same in the office of the clerk of the circuit court of said county and thereupon the amount of such warrant shall become a lien upon the title to any real or personal property of such taxpayer, situated in said county, against whom such warrant is issued in the same manner as a judgment duly docketed and recorded in the office of such clerk of the circuit court. Upon the recording of such warrant, the clerk of the circuit court shall issue execution thereon, the same as on a judgment. Such sheriff shall thereupon proceed in all respects and with like effect and in the same manner as prescribed by law and in respect to executions issued against property upon judgment of the circuit court and shall be entitled to the same fees for his services in executing the warrant to be collected. Upon payment of such execution, warrant or judgment the comptroller shall within thirty days, satisfy the lien of record and is hereby specifically authorized and directed to do so.

(4) If any taxpayer or person required by this chapter to remit taxes to the comptroller shall feel aggrieved by any action of the comptroller, he shall have the right within thirty days to appeal to the comptroller for re-hearing and re-examination and in support thereof may submit such data as may be relevant. If the comptroller's decision is determined adversely to the taxpayer or person required by this chapter to remit to the comptroller, such person shall have the right within thirty days from notice of such determination to have the comptroller's determination reviewed in appropriate proceedings in any of the circuit courts of Florida, and in such review there shall be no presumption in favor of the comptroller's findings.

212.151 Jurisdiction of suits for violation of revenue act; service on retailers, dealers or vendors not qualified to do business in state.—In all suits brought hereafter in any of the courts of this state by the comptroller against

any retailer, dealer or vendor for any violation of the Florida revenue act of 1949, such suits shall be brought thereon in the circuit courts of this state having jurisdiction of the subject matter. Every retailer, dealer or vendor not qualified to do business in this state shall designate with the comptroller an agent for service within the state for the purpose of enforcing this chapter. If a retailer, dealer or vendor has not designated or shall fail to designate with the comptroller an agent for service within the state, then the secretary of state shall be deemed the agent for service, or any agent or employee of the retailer, dealer or vendor within the state shall be deemed agent for service.

212.16 Importation of goods, permits; seizure for non-compliance, procedure, review.—

(1) For the protection of the revenue of this state, to prevent the illegal importation of tangible personal property which is subject to tax in this state, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this chapter, the comptroller is hereby authorized and empowered to put into operation, a system of permits whereby any person or dealer as defined in this chapter may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having said truck, automobile, or other means of transportation seized and subjected to legal proceedings for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property into this state, which property is subject to tax imposed by this chapter, to apply to the comptroller or his designated agent for a permit stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind of character of tangible personal property to be imported, the date, the name and address of

the consignee and such other information as the comptroller may deem proper or necessary to prevent the illegal transportation of tangible personal property into this state. Such permit shall be free of cost to the applicant and may be obtained from the comptroller or any of his designated agents.

(2) The importation into this state of tangible personal property which is subject to tax, by truck, automobile, or other means of transportation other than a common carrier without having first obtained a permit as hereinabove described (if the tax imposed by this chapter on the said tangible personal property has not been paid), shall be construed as an attempt to evade payment of the said tax and the same is hereby prohibited and the said truck, automobile or other means of transportation, other than that of common carrier, and said taxable property may be seized by the comptroller in order to secure the same as evidence in a trial and the same shall be subject to forfeiture and sale in the manner provided for in this chapter. No permit shall be required to transport personal effects of a driver, owner, or passengers of any private automobile or carrier vehicle not engaged in carrying goods for resale within the state; provided, that the comptroller may issue a regular permit (which shall be good for not more than one year) to a person to whom a dealer's certificate has been issued and who is regularly or frequently importing into the state tangible personal property in trucks owned by him in connection with his own business, requiring that reports, copies of sales documents, and other information may be filed at regular or frequent intervals with the comptroller after importation of tangible personal property subject to the tax, and the comptroller may require as a condition for the issuance of such regular permit that such person post a bond payable to the comptroller in an amount sufficient to guarantee payment of the tax on such goods as may be imported by such

person, which amount the comptroller shall set. Such permit shall be free of cost to the applicant.

(3) Subject to the above stated exception of private vehicles, any truck, automobile, or other means of transportation other than a common carrier which is used to import into this state tangible personal property which is subject to tax under this chapter, together with the contents thereof, is hereby declared to be contraband and subject to confiscation unless a permit as herein above described was first obtained. The comptroller may confiscate any such truck, automobile, or other means of transportation other than common carrier together with its contents whenever the same is found to be importing without permit tangible personal property, the sale or use of which is taxable under this chapter.

(4) Upon seizure for confiscation, the comptroller or his representatives shall appraise the value of the vehicle and its said contents according to his best judgment and shall deliver to the person, if any found in possession of such property, a receipt showing the fact of seizure, from whom seized, the place of seizure, a description of the vehicle and contents seized. A copy of said receipt shall be filed in the office of the comptroller and shall be open to public inspection.

(5) The comptroller, or any representative of the comptroller, shall within thirty days advertise the said vehicle and its contents or other property so seized for sale to the highest bidder by one proper notice in a newspaper published in the county where the property is to be sold, if the county has such a newspaper, if there is no newspaper in such county, then by notice on the courthouse door, at least thirty days prior to the date of sale and contain a description of the vehicle and property to be sold.

(6) Any person claiming any property so seized as contraband goods, may, at any time before the sale, file

with the comptroller, at Tallahassee, a claim in writing requesting a hearing and stating his interest in the article seized. The comptroller shall set a date and place for hearing within ten days from the day the claim is filed. The comptroller is hereby empowered to subpoena witnesses and compel their attendance at the hearing authorized under this chapter. All parties to the proceeding including the person claiming such property shall have the right to have subpoenas issued by the comptroller to compel the attendance of all witnesses deemed by such parties to be necessary for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileages shall be paid as a part of the cost of the proceeding.

(7) In the event the ruling of the comptroller is favorable to the claimant, the comptroller shall deliver to the claimant the vehicle or property so seized. If the ruling of the comptroller is adverse to the claimant, the comptroller shall proceed to sell such contraband goods in accordance with the foregoing provisions of this chapter. The expense of storage and transportation, shall be adjudged as part of the cost of the proceedings in such manner as the comptroller shall fix pending any proceeding to recover a vehicle or other property seized under this chapter. The comptroller may order delivery thereof to any claimant who shall execute with one or more sureties, approved by the comptroller, and deliver to the comptroller, a bond in favor of the state for the payment of a sum double the appraised value thereof as of the time of the hearing; and providing further that if the vehicle or other property is not returned at the time of the hearing the bond shall stand in lieu of, and be forfeited in the same manner as such vehicle or other property.

(8) The action of the comptroller may be reviewed by a petition for common law writ of certiorari addressed to

the circuit court of any county wherein said hearing was held which petition shall be filed within ten days from the date the order of the comptroller is made.

(9) Immediately upon the granting of the writ of certiorari the comptroller shall cause to be made, certified, and forwarded to said court a complete transcript of the proceeding in said cause, which shall contain all the proofs submitted before the comptroller. All defendants named in the petition desiring to make defense, shall answer or otherwise plead to said petition within ten days from the date of the filing of said transcript unless the time be extended by the court.

(10) Said decision of the comptroller shall be reviewed by the circuit court solely upon the pleadings and transcript of the evidence before the comptroller, and neither party shall be entitled to introduce any additional evidence in the circuit court. The confiscated vehicle or goods shall not be sold pending such review but shall be stored by the comptroller until the final disposition of said case.

(11) Within the discretion of the comptroller, the claimant may be awarded possession of the confiscated goods pending the decision of the circuit court under the petition for certiorari, provided the claimant shall be required to execute a bond payable to the state, in an amount double the value of the property seized, the sureties to be approved by the comptroller. The condition of the bond shall be that the obligors shall pay to the state, the full value of the vehicle or goods seized unless upon certiorari the decision of the comptroller shall be reversed and the property awarded to the claimant.

(12) If no claim is interposed such vehicle, or other goods shall be forfeited without further proceedings and the same sold as hereinabove provided. The above procedure is the sole remedy of any claimant and no court

shall have jurisdiction to interfere therewith by replevin, injunction, supersedeas, or in any other manner.

(13) Any funds derived from the sale of confiscated vehicles or other goods shall be distributed or allocated in the same manner as other funds derived from the taxing statute.

212.17 Credits for returned goods, rentals, or admissions; additional powers of comptroller.—

(1) In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by this chapter has been collected, or charged to the account of the consumer or used, the dealer shall be entitled to reimbursement of the amount of tax collected or charged by him, in the manner prescribed by the comptroller; and in case the tax has not been remitted by the dealer to the comptroller, the dealer may deduct the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than ninety days. The comptroller shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for such tax collected. Such memorandum shall be accepted by the comptroller at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter, provided in cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the comptroller that the tax was not due.

(2) The comptroller shall design, prepare print and furnish to all dealers, or make available to said dealers, all necessary forms for filing returns and instructions to insure a full collection from dealers and an accounting for the taxes due, but failure of any dealer to secure such

forms shall not relieve such dealer from the payment of said tax at the time and in the manner herein provided.

(3) The comptroller and his assistants are hereby authorized and empowered to administer the oath for the purpose of enforcing and administering the provisions of this chapter.

(4) The comptroller shall have the power to make, prescribe and publish reasonable rules and regulations not inconsistent with this chapter, or the other laws, or the constitution of this state, or the United States, for the enforcement of the provisions of his chapter and the collection of revenue hereunder, and such rules and regulations shall when enforced be deemed to be reasonable and just.

(5) The comptroller, where admissions or rental payments are made and thereafter returned to the payers, after the taxes thereon have been paid, shall return or credit the taxpayer for taxes so paid on the monies returned in the same manner as is provided for returns or credits of taxes where purchases or tangible personal property are returnable to a dealer.

212.18 Administration of law; rules and regulations.—

(1) The cost of preparing and distributing the reports, forms and paraphernalia for the collection of said tax and the inspection and enforcement duties required herein shall be borne by the revenue produced by this chapter, provisions for which are hereinafter made.

(2) The comptroller shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. He is authorized to make and publish such rules and regulations not inconsistent with this chapter, as he may deem necessary in enforcing its provisions in order that there shall not be collected on

the average more than the rate levied herein. The comptroller is authorized to and he shall provide by rule and regulation a method for accomplishing this end. He shall prepare instructions to all persons required by this chapter to collect and remit the tax to guide such persons in the proper collection and remission of such tax and to instruct such persons in the practices that may be necessary for the purpose of enforcement of this chapter and the collection of the tax imposed hereby. The use of tokens in the collection of this tax is hereby expressly forbidden and prohibited.

(3) Every person desiring to engage in or conduct business as a dealer as defined in this chapter, or in leasing, renting or letting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps, as hereinbefore defined in this chapter, in this state shall file with the comptroller a certificate of registration for each place of business, show the name of the interested persons in such business, their residences, the address of the business, and such other data as the comptroller may reasonably require. Such application shall be made to the comptroller on or before thirty days after November 1, 1949, or on or before such person, firm or corporation may engage in such business, and it shall be accompanied by a registration fee of one dollar. The comptroller, upon receipt of such application will grant to the applicant, a separate certificate of registration for each place of business within the state which certificate shall not be assignable and shall be valid only for the person, firm or corporation to whom issued, and such certificate shall be placed in a conspicuous place in the business or businesses for which it is issued, and so displayed at all times. No person shall engage in business as a dealer, or in leasing, renting or letting of living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, rooming houses, tourist or trailer camps,

as hereinbefore defined in this chapter, on or before thirty days after November 1, 1949, without first having obtained such a certificate, and no person shall receive any license from any authority within the state to engage in any such business after November 1, 1949, without first having obtained such a certificate. The engaging in the business of selling or leasing tangible personal property or as a dealer as defined in this chapter, or engaging in leasing, renting or letting of living quarters, sleeping or house-keeping accommodations in hotels, apartment houses, or rooming houses, or tourist or trailer camps, as hereinbefore defined in this chapter, without such certificate first had and obtained within the time limits set forth above, is hereby prohibited.

(4) The comptroller is hereby given the authority to purchase such supplies and equipment as may be necessary and incur any other necessary expenses as are proper for the enforcement and administration of this chapter.

212.19 All state agencies to cooperate in administration of law.—The state hotel and restaurant commission and the state beverage department shall, within fifteen days after November 1, 1949, supply to the comptroller a complete list of all persons, places and establishments licensed by them. The comptroller is further empowered to call on any state agency, department, bureau or board for any and all information which may, in his judgment, be of assistance in administering or preparing for the administration of this chapter, and such state agency, department, bureau or board is hereby authorized, directed and required to furnish such information.

212.20 Funds collected, disposition; additional powers of comptroller.—

(1) The comptroller shall pay over to the treasurer of the state, all funds received and collected by him under

the provisions of this chapter, to be credited to the account of the general revenue fund of the state.

(2) The comptroller is authorized to employ all necessary assistants to administer this chapter properly and is also authorized to purchase all necessary supplies and equipment which may be required for this purpose, and in order to put the chapter into effect, the sum of fifty thousand dollars, or so much thereof as is necessary, is hereby appropriated out of the general revenue fund for use by the comptroller in purchasing supplies, equipment, etc., to begin the administration of this chapter.

(3) All necessary expenses of employees to administer this chapter shall be paid in the manner provided by law applicable to expenses of other state officials and employees.

(4) In addition to all other appropriations made by law to the comptroller, there is hereby appropriated from the general revenue fund a sum not to exceed three percent of the tax collected under the provisions of this chapter to be used by the comptroller for the administration and enforcement thereof; provided, however, the provisions of this section relating to administrative expense shall become null and void and of no effect after June 30, 1951, and in no wise shall be construed as a continuing appropriation after such date.

(5) There is hereby appropriated out of the general revenue fund from the net proceeds of the tax collected under this chapter, a sum which added to all other sums appropriated by law to said fund will equal the amount of the total appropriation contained in the general appropriation act (chapter 282), as passed and enacted into law by the 1949 regular or extraordinary session of the legislature. Any surplus monies remaining in the general revenue fund from the net proceeds of the tax levied and

collected under this chapter after meeting in full the appropriations hereinabove set forth, shall be impounded in said fund and expended only under the express authority of future, regular or extraordinary sessions of the legislature.

212.21 Declaration of legislative intent.—

(1) If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of the chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable or void portion or portions of this chapter did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective or void portions of this chapter, the legislature would have enacted the valid and constitutional portions thereof.

(2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption or rental levied and set forth in this chapter except as to such sale, admission, use, storage, consumption, or rental, as shall be specifically exempted therefrom, subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption or rental or any of them exempted or attempted to be exempted from the tax

or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

(3) It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses, storages, consumption or rentals in relation to or in respect of the things set forth as exempted from the tax, as may be exempted in accordance with the provisions of the constitution of the state and of the United States, and it is further declared to be the specific legislative intent to tax each and every the taxable privileges made subject to the tax or taxes or the operation of the tax or taxes, or the imposition of the tax or taxes except such sales, admissions, uses, storages, consumption or rentals as are specifically exempted therefrom, and such exemption is made only to the extent that such exemption may be made in accordance with the provisions of the constitution of the state and of the United States.

(4) It being further declared to be the specific legislative intent that in the event any exemption or attempted exemption of any sale, admissions, use, storage, consumption or rental from the tax or taxes imposed by this chapter is for any reason declared to be unconstitutional, ineffective, inapplicable or void, that then and in such event each and every such sale, admission, use, storage, consumption or rental shall be subject to the tax or taxes imposed by this chapter as fully and to the same extent as if such exemption or attempted exemption had never been included herein, it being declared to be the specific legislative intent that no unconstitutional, invalid, ineffective, inapplicable or void exemption or attempted exemption or exemptions or attempted exemptions induced the passage of this chap-

ter, it being further declared to be the specific legislative intent that without the inclusion herein of any such unconstitutional, invalid, ineffective, inapplicable or void exemption or attempted exemption, exemptions or attempted exemptions, the valid portions of this chapter would have been enacted; provided, however, that should the provisions, or any one or more of them, set forth in § 212.22, requiring two certain other and separate acts of the 1949 extraordinary session of the legislature to become laws as conditions precedent to this act becoming a law, for any reason to be held or declared to be unconstitutional, inoperative or void, then in such event it is not intended that § 212.22 or any part thereof be separable from any of the remaining provisions of this chapter, but in such event it is expressly intended that this chapter be inseparable in its entirety.

212.22 Savings provisions.—Nothing herein contained shall be construed as repealing any general or special act authorizing a municipality to levy a special tax upon admission tickets which said tax is now being levied by such municipality.

212.23 Effective date; additional declaration of legislative intent.—It is hereby declared to be the legislative intent that this chapter is an integral part of a revenue program, which program includes, in addition to the provisions set forth in this chapter, certain aid to municipalities through another and separate act (ch. 210) designed to authorize municipalities to levy a tax up to five cents per package on cigarettes, which tax shall be collected by the state beverage director and remitted to the municipalities levying such taxes pursuant to said other act, and certain aid to counties through another and separate act (§ 208.44), designed to allocate to the several counties of the state, the proceeds of the so-called "7th Cent Gas Tax" in the manner as provided in said other

and separate act, both of which said other and separate acts are acts passed or to be passed in the 1949 extraordinary session of the legislature; and it is the legislative intent that the tax hereby levied in this chapter shall not levy unless and until the said two other and separate acts shall become law. Therefore, this chapter shall take effect November 1st, 1949, immediately after and only after the said two other and separate acts become law. Provided, however, if for any reason either of the two said other and separate acts should fail to become a law then in such event it is the declared legislative intent that this chapter shall not take effect but shall be inoperative and void.

L I B R A R Y

C O U R T . U . S .

No. 80

Office-Supreme Court, U.S.

F I L E D

JAN 28 1960

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1959

SCRIPTO, INC.,
Appellant,

vs.

DALE CARSON, as Sheriff of Duval County,
Florida, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Florida.

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the Supreme Court of the State of Florida is reported officially in 105 So. 2d 775. The final decree of the Circuit Court of Duval County, Florida, is not reported. The opinion of the Supreme Court of Florida (R. 30), the judgment of that court (R. 42), and the final decree of the Circuit Court of Duval County (R. 24), are printed in the record.

JURISDICTION

This suit was brought by the appellant in the Circuit Court of Duval County, Florida, to enjoin the collection

from appellant of a use tax assessed by the State Comptroller pursuant to Chapter 212, Florida Statutes, on the ground that said statute, if construed to make appellant liable for collection of such tax, violates the commerce clause of Article I, Section 8, and the due process clause of Amendment XIV of the Constitution of the United States, and is, therefore, invalid (R. 6-7). The Circuit Court construed the statute to impose such liability on appellant, sustained the validity of the statute as thus construed and applied, and denied appellant the relief sought (R. 24-26). The Supreme Court of Florida, on October 17, 1958, affirmed the judgment of the Circuit Court, and on December 3, 1958 denied appellant's petition for rehearing (R. 42-43). Appellant, on February 28, 1959, filed in the Supreme Court of Florida its notice of appeal to the Supreme Court of the United States (R. 45). By order dated April 21, 1959, a Justice of the Supreme Court of Florida, pursuant to Rule 13 of this Court, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket this case on appeal to the Supreme Court (R. 45). The case was docketed in this Court on May 27, 1959, and the Court noted probable jurisdiction on October 12, 1959 (R. 48).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2).

STATUTE INVOLVED

The Statute which is involved, and the validity of which, as construed and applied in this case, is chal-

lenged by appellant; is Chapter 212, Florida Statutes, known as the Florida Sales and Use Tax Law (Florida Revenue Act of 1949, as amended through the year 1956). That statute is lengthy, and it is, therefore, set out in Appendix A of Appellant's brief. The opinion and judgment of the Supreme Court of Florida is based primarily upon that court's interpretation of Section 212.06 (2) (g) of that statute which requires a "dealer" to collect the use tax, and defines the term "dealer" as follows:

" 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser. . . ."

QUESTION PRESENTED

While the appellee agrees substantially with the questions as presented by the appellant, it is our opinion that the question may best be stated in the following manner:

1. Does the finding of the Florida Supreme Court that Scripto, Inc., is a dealer within the contemplation of Chapter 212, Florida Statutes, violate the due process clause of the XIV Amendment or the Commerce Clause, Article I, Section 8, of the Constitution of the United States?

STATEMENT OF THE CASE

Appellant's statement of the case and of the facts involved is substantially correct, and we shall add to such statement only a few points which we feel need to be clarified.

Adgif Company is not a separate corporation, but is wholly owned by the appellant, Scripto, Inc., and part of the business of the appellant is operated under the name of Adgif Company (R. 15). In other words, Adgif Company is merely a trade name used and employed by the appellant for the conduct of certain phases of the appellant's business.

The independent manufacturer's representatives, jobbers and commissioned merchants who solicit orders for Adgif products on behalf of the appellant in the State of Florida, do so under a written agreement with the appellant (R. 19, Exhibit C). This agreement provides, among other things, that such independent manufacturer's representatives, jobbers and commissioned merchants have no authority to, and shall not, make collections or incur any debts involving appellant. Order forms furnished by the appellant to these independent manufacturer's representatives, jobbers and commissioned merchants for use in taking orders in soliciting on behalf of the appellant, contain a similar provision (R. 21, Exhibit D).

The Circuit Court found in the Final Decree that the appellant, Scripto, Inc., is a "dealer" within the intent and meaning of Chapter 212, Florida Statutes, 1955,

as to orders solicited by independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida, for the sale by the appellant, under the trade name of Adgif Company, of merchandise shipped into the State of Florida by appellant for use and consumption therein. The Decree found further that such requirement of the statute was a valid exercise of the taxing powers of the State of Florida and was not unconstitutional as contended by appellant. The appellant took an appeal from the Final Decree entered by the Circuit Court (R. 26).

On the appeal the Supreme Court of Florida stated in its opinion filed October 17, 1958, as follows:

"It is no answer to point out that the Florida representatives of the appellant operate and own independent business as commissioned jobbers. To the extent that they contact Florida consumers in the interest of advancing appellant's business and in bringing about sales of appellant's commodities to Florida customers, they are just as much representatives of the appellant under the subject statute as if they were salaried employee solicitors operating pursuant to identical limitations of contract. Bear in mind that their Florida jobbers represent appellant in Florida pursuant to specific written contracts" (R. 41). The appellant, "Scripto, Inc. is a dealer within the contemplation of Chapter 212, Florida Statutes, and as such should register in the State of Florida as required by that act and collect and remit to the State of Florida through its Com-

troller the Use Tax imposed by the state on the mechanical writing instruments sold to Florida customers by Scripto, Inc. via Adgif" (R. 42).

ARGUMENT

It is the opinion of the appellee in this case that we must first consider the finding of the Florida Supreme Court in the construction of the statute in question, Chapter 212 and particularly Section 212.06(2)(g). An elementary but very significant principle of law is that federal courts, including the Supreme Court of the United States, are bound by the construction given by state courts of last resort to their own constitution and laws enacted thereunder, and that federal courts, as a general rule, will follow the decisions of the highest court of a state, unless such decisions conflict with or impair the efficacy of some principle of the Federal Constitution or of a federal statute. (American Jurisprudence, Courts, Section 99)

In this case the United States Supreme Court is bound by the holding of the Florida Supreme Court that Scripto, Inc., is a dealer within the contemplation of the Florida Statute to the same extent as it considered itself bound by the construction given an Iowa Statute by the Supreme Court of Iowa in *General Trading Company vs. State Tax Comm. of Iowa*, (1944) 322 U.S. 335, 88 L. Ed. 1309.

In urging that the construction given by the Florida Supreme Court to Chapter 212, Florida Statutes, holding to be a "dealer" under the statute, renders the statute

unconstitutional, the appellant contends that under such construction the statute violates the commerce clause and due process clause of the Federal Constitution.

There have been a number of decisions by the United States Supreme Court in which state use tax acts have been found to be a valid exercise of a state's taxing powers under factual situations very similar to the case at bar. Apparently, appellant has overlooked these several decisions which we think are controlling.

Appellant relies chiefly on *Miller Bros. Co. vs. Maryland* (1954) 347 U.S. 340, 98 L. Ed. 744. As we view this case, it is based on facts that are so dissimilar and so clearly distinguishable from the facts in the instant case that it can in no way be controlling.

It is our contention that *General Trading Company vs. State Tax Comm. of Iowa*, (1944) 322 U.S. 335, 88 L. Ed. 1309, sets forth the principal that is applicable to the case at bar. In this case the Supreme Court of the United States had before it a case wherein a Minnesota corporation, which had not qualified to do business in Iowa and which maintained no office or other place of business there, made sales of goods in Minnesota which were sent by common carrier, or by mail, to purchasers in Iowa. Orders solicited in Iowa by salesmen from headquarters in Minnesota were taken subject to acceptance by General Trading Company, the Minnesota corporation, at the home office in Minnesota. The question before the Court was whether or not an Iowa statute imposing a tax upon the use of goods sold by the Minnesota

corporation to consumers in Iowa, under which the Minnesota corporation was required to collect the tax and pay it over to the State of Iowa, violated the Constitution of the United States.

Prior to the appeal to the United States Supreme Court, the Iowa Supreme Court had determined that General Trading Company, the Minnesota corporation, was required to collect the use tax on personal property sold by it for use in Iowa. In this situation, the United States Supreme Court on the appeal held that the state court's application of its local laws was binding on the United States Supreme Court and ruled accordingly. The only question therefore before the Supreme Court of the United States was, as stated above, whether the Iowa Use Tax Law, as construed by the Iowa Court, was in violation of the Federal Constitution.¹

In finding that the Iowa Statute, as construed by the Iowa Court, did not violate the Federal Constitution, the United States Supreme Court had this to say:

"... the mere fact that property is used for interstate commerce or has come into the owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory to

¹The persons soliciting the Iowa sales for General Trading Company were apparently employees of General Trading Company. In the case at bar, Adgif's merchandise is sold only by commissioned agents, although Scripto does have an employee salesman in the State of Florida. We shall hereinafter demonstrate that, in either case, the legal result must be the same.

ward interstate commerce. See *Best & Co. vs. Maxwell*, 311 U.S. 454.

"None of these infirmities affects the tax in this case any more than it did in the other case with which it forms a group. *The tax is what it proposes to be—a non-discriminatory excise laid on all personal property consumed in Iowa.* The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. *To make the distributor the tax collector is a familiar and sanctioned devise.*" *Monomotor Oil Co. vs. Johnson*, 292 U.S. 86, 93-94; *Felt vs. Gallagher*, 306 U.S. 62 (Emphasis supplied)

There have been a number of other opinions of the Supreme Court of the United States touching on the use tax question involved herein. Practically all of these opinions by the United States Supreme Court pertinent to the facts in the instant case have been thoroughly examined and discussed by the Supreme Court of Maryland in a case similar to the case at bar—*Topps Garment Manufacturing Corporation vs. State of Maryland*, (1957) 128 A. 2d 595.

In *Topps Garment Manufacturing Corporation*, the issue involved was the right of the State of Maryland to compel a foreign corporation, not qualified to do business in Maryland, to collect a use tax on goods shipped by the foreign corporation directly to resident purchasers, on orders solicited within the State of Maryland by commissioned salesmen, who were not employees of

the foreign corporation, where such orders were accepted by the foreign corporation outside the territory of the State of Maryland.

The stipulation of facts entered into by the foreign corporation and the State of Maryland showed that Topps Garment Manufacturing Corporation is an Indiana corporation which manufactures uniforms that it sells in various states of the United States. It neither owns nor rents any office, showroom, distribution center or warehouse in Maryland. It sells its products to Maryland purchasers by means of independent commissioned solicitors, some of whom are Maryland residents. These solicitors are furnished with catalogs and order blanks by the corporation. They are not on Topps' payroll, are not under supervision of Topps and do not account to Topps for their time or on whom they call with catalogs. When a solicitor takes an order for goods shown in the catalog, he receives a percentage of the price as a deposit, which he retains as his commission. The order is then mailed by the solicitor to Topps, which has the right to accept or reject it. If the order is accepted, the goods are mailed by Topps direct to the purchaser, usually C.O.D., but in some cases on credit or open account. Solicitors come and go.

The Comptroller of the State of Maryland made attempts to obtain permission from Topps for an audit of all Maryland sales during the limitations period, so as to have a basis for a use tax assessment. Such attempts at an audit failed, however, and the Comptroller eventually made an estimated assessment, filing a lien in the Circuit

Court, whereupon an attachment was issued, and a Topps account with one of its customers was garnished. Topps thereupon brought suit attacking the validity of the judgment purely on constitutional grounds and did not, as does Scripto in the case at bar, deny that the Use Tax Statute in terms imposes upon a foreign corporation the liability to collect a use tax on goods sold to Maryland purchasers. However, Topps did contend, as does Scripto in the case at bar, that in the light of its slight connection with the State of Maryland, the statute attempting to make it liable for the collection of the tax offended both the Commerce Clause and the Due Process Clause of the Federal Constitution.

As hereinabove stated, the Maryland Court in reaching its decision that Topps Garment Manufacturing Corporation was liable for the collection of the Maryland use tax on sales made by it to persons in Maryland reviewed at length the various decisions of the United States Supreme Court which it deemed pertinent to the facts before them, and, in respect to the decisions had this to say:

"In General Trading Co. v. State Tax Commission, 322 U.S. 335, 88 L. Ed. 1309, The Supreme Court held that Iowa, under her use tax law, which imposed upon 'Every retailer maintaining a place of business' in the State the duty to collect the tax from the purchaser, could constitutionally compel an out of state corporate vendor to collect the tax. In that case, a Minnesota corporation which had never qualified as a foreign corporation in Iowa and which did not maintain there any office, branch or warehouse, sent salesmen into the State to solicit or

ders that were always subject to acceptance or rejection in Minnesota whence the goods were shipped by common carrier or the post to the Iowa buyers, the Court noted that no State could tax the privilege of doing interstate business, but that a non-discriminatory excise tax on all personal property consumed within the State, laid against the ultimate consumer—the Iowa resident was valid, as had previously been held, and that 'To make the distributor the tax collector for the State is a familiar and sanctioned device.' A judgment for the State was upheld against the foreign corporation which had entered its appearance to contest the claim.

"In *Miller Bros. Co. vs. Maryland*, 347 U.S. 340, 98 L. Ed. 744, the Supreme Court reversed a judgment of this Court and held that the due process clause of the Fourteenth Amendment prevented Maryland from making Miller Brothers Company, a Delaware corporation, the collector of 'use tax on goods sold directly to inhabitants of Maryland at the corporation's store in Delaware. The vendor's only connection with Maryland was advertising in Delaware papers and radio stations that reached the notice of Marylanders, the occasional mailing of notices to former customers some of whom lived in Maryland, and the delivery of some purchases in Maryland by its own truck. Mr. Justice Jackson, who wrote the opinion of the majority of five Justices, noted that he had dissented in the *General Trading Co.* case and that whether or not in so doing 'he made a correct application of principles of jurisdiction to the particular facts, it is clear that circumstances absent here were there present to justify the Court's approval of liability for collecting the tax.' He continued: 'That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local

solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant.

"In *Thompson v. Rhodes-Jennings Furn. Co.*, 268 S.W. 2d 376, the Supreme Court of Arkansas followed the *General Trading Co.* case on analogous facts, having concluded that *Miller Brothers* had in no way impaired its validity and authority. The Supreme Court denied certiorari under the name of *Branyan & Peterson v. Thompson*, 348 U.S. 872, 99 L. Ed. 686. See also *Field Enterprises v. State* (Wash.) 289 P. 2d 1010, affirmed by the Supreme Court, 1 L. Ed. 2d 39, as reiterating that the commerce clause is not offended by what Maryland requires of appellant. We conclude that unless there is a controlling distinction between the facts here and those of *General Trading Co.*, the answer here is given by that case. Appellant argues that there is a difference in that the salesmen in General Trading were servants of the foreign corporation continuously in its employ, while in the case at bar, the solicitors in Maryland were independent contractors not under supervision and were part time employees who often represented other vendors. Appellant's contention on this point seems to be directed at showing that there could be due process in requiring a corporation in the position of General Trading Company to act as collector of taxes, but that there would be a lack of due process in requiring one situated as is Topps to perform that function.

"The fact that the solicitors in the present case were agents who were independent contractors, rather than agents who were servants makes no difference. It is beyond question that they were agents of Topps for the purpose of displaying its products by means of its catalogs, for the taking of orders for those products; for the forwarding of the orders to headquarters and for the purpose of accepting deposits on the sales. The activities of the individual solicitors may have been intermittent but in total their activities were regular, systematic and productive of a substantial flow of goods into Maryland. The Supreme Court made it plain in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, that an unqualified foreign corporation could be made subject to jurisdiction and compelled to make contributions required of local employers to the state unemployment compensation fund where its presence was evidenced only by regular and systematic solicitation of orders in the state by salesmen on commission, resulting in a continuous interstate flow of the corporation's products to resident buyers (the only additional activity was the display of samples). Mr. Justice Stone said inter alia that the presence of a corporation without, as well as within, the State of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it and such contacts of a corporation with the state of the forum as make it reasonable in the context of our federal system of government, to require the corporation to defend a particular suit brought there may satisfy the demands of due process. See also *United States v. Seephony Corporation*, 333 U.S. 795, 92 L. Ed. 1091. We think that activities carried on in behalf of the foreign corporation by agents who are independent contractors, in connection with the matters for

which they are agents, are as much in behalf of the corporation as similar activities carried on by agents who are servants, and we see no significant distinction in the two situations. The test is the nature and the extent of the activities. *State v. Penna. Steel Co.*, 123 Md. 212.

"The Supreme Court gave indication of this in the *General Trading Co.* case, when it pointed out that *Felt & Warrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 83 L. Ed. 488, and *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 85 L. Ed. 888, were controlling although in the *Gallagher* case, there were far more elaborate arrangements for soliciting orders (two exclusive distributors), and in the *Sears* case, the vendor had retail stores in the State, and said: 'All these differentiations are without constitutional significance.' In *Travelers Health Asso. v. Virginia*, 339 U.S. 643, 94 L. Ed. 1154, the foreign company was a non-profit membership association incorporated in Nebraska, where its only office was located. It conducted a mail order health insurance business systematically soliciting new members, usually through the unpaid activities of Virginia residents who were already members. Virginia enjoined it from further solicitation of sales in the State. The Court held that its contacts with Virginia were sufficient to sustain jurisdiction, relying in part on the *International Shoe Co.* case. In *McGoldrick v. Berwind-White Coal Co.*, 309 U.S. 33, 49, 84 L. Ed. 565, 572, the Supreme Court equated the New York City tax on sales for consumption in the city with the ordinary use tax, such as is before us, that the Court had previously sustained as constitutional. In *McGoldrick v. DuGrenier, Inc.*, 309 U.S. 70, 84 L. Ed. 584, a Massachusetts corporation accepted or rejected at its headquarters in Massachusetts orders solicited in New York City by an independent con-

tractor, Stewart & McGuire, Inc., and shipped its products direct to the purchaser. It was held that to hold it liable to collect the tax did not infringe the Constitution. Professor Thomas Reed Powell, in a note in 57 Harvard L.R. 1086, 1090, 'Sales and Use Taxes Collection from Absentee Vendors,' says of the Dugrenier case: 'Although the New York headquarters and activities availed of by these vendors were not their own but those of another, these exclusive agents amounted to an alter ego who, except possibly for some difference in methods of compensation and control, did exactly what the vendor might do through its own hired men. Obviously it would open the door to easy devices for tax avoidance if slight shifts in the contractual arrangements between solicitors and vendors could make a difference.' *Bomze v. Nardis Sportswear*, 165, F. 2d 33, held that activities in the State of an agent in form certainly and in substance essentially an independent contractor, made the principal subject to jurisdiction. In distinguishing a New York case, Judge Learned Hand said for the Court: '... we cannot see that it was important that the agent worked for several principals.' See also *Labente v. American Mercury Magazine*, (N.W.) 96 A. 2d 200; *Fielding v. Superior Court* (1st App. Dist. Cal.) 244 P. 2d 968, 970; *Wooster v. Triwest Mfg. Co.* (Mo.), S.W. 2d 411; *Holland v. Parry Nev. Co.*, 7 F.R.D. 471; *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654, 660; *Com. de Astral v. Boston Mfg. Co.*, 205 Md. 237; *Storey v. United Ins. Co.*, 64 F. Supp. 896; *Fletcher Cyclopedia Corporations*, Perm, Md. Vol. 18, Sec. 8718; *The Growth of the International Shoe Doctrine*, 16 University of Chicago L.R. 523; *Expanding Jurisdiction over Foreign Corporations*, 37 Cornell L.Q. 458; *Enforcing State Consumption*

Taxes on Out-of-State Purchases, 65 Harvard L.R. 301.

"We think it clear from the authorities cited that appellant is not helped by the fact that its soliciting agents in Maryland were independent contractors, and that its activities in and in relation to Maryland clearly accord with the 'traditional notions of fair play and substantial justice' which the *International Shoe Co.* case says are proper tests to determine whether a state may exercise jurisdiction in a particular situation. We think the authorities establish that appellant is not denied due process of law by what the State has done. . . ."

The case of *Miller Bros. Co. vs. Maryland*, 347 U.S. 340, 98 L. Ed. 744, on which the appellant relies, does not, as we have already asserted, have any application whatever to the case at bar. In that case, the holding was that a department store located in Wilmington, Delaware, could not be forced to collect a use tax for the State of Maryland on merchandise purchased at the Delaware store by Maryland residents for use in the State of Maryland.

The stipulated facts in that case show that Miller Brothers Company did no advertising in the State of Maryland other than to occasionally mail to known customers in Maryland fly sheets on some special sale. Occasional deliveries were made from the Delaware store to customers residing in Maryland; and occasional deliveries were made in Maryland by parcel post or express. Miller Brothers Company had no way whatever to determine how much merchandise was purchased at its store in Delaware by residents of Maryland for use

in Maryland, the residence of such persons being unknown to the store. Under such facts, it was held that Miller Brothers Company was not required to collect Maryland use tax for merchandise sold by it to Maryland residents while in Delaware, who used such merchandise in the State of Maryland.

The controlling facts in the *Miller Brothers Company* case are entirely different from the facts in the instant case. Scripto, Inc. employs a salesman residing in the State of Florida (A. 14); employs ten independent manufacturer's representatives, jobbers and commissioned merchants in the State of Florida to solicit orders for Scripto merchandise (A. 43); furnishes such representatives catalogs, order forms, samples, sample cases and advertising material to assist them in the solicitation of orders in the State of Florida (A. 16); accepts payment for all merchandise sold for use in the State of Florida directly from the Florida customer (A. 16); pays directly to said solicitors a commission for all sales made in the State of Florida (A. 16); and consummates all sales by shipment of merchandise to be used in the State of Florida directly to purchasers of same in the State of Florida (A. 16).

The case *Thompson v. Rhodes-Jennings Furniture Company*, (Ark.) 268, S.W. 2d 376, Cert. den., 348 U.S. 872, 99 L. Ed. 686, referred to in the opinion of the Supreme Court of Maryland in *Topps Garment Manufacturing Corporation vs. State of Maryland*, supra, was a case wherein the facts were similar to those in the case at bar, in which the Miller Brothers Company case was

relied on as forbidding the requirement of use tax collection by the State of Arkansas. It was determined in that case that the *Miller Brothers Company* case was in no way controlling.

Rhodes-Jennings Furniture Company was located in Memphis, Tennessee, and employed sales representatives similar to those employed by Scripto, Inc. to solicit business in Arkansas. The salesmen would receive orders in Arkansas, send them to Tennessee for acceptance or rejection, and upon acceptance, the merchandise would be shipped from Tennessee to the purchaser's address in Arkansas, for use in Arkansas. Decision in the case, by stipulation of the parties, was withheld by the Supreme Court of Arkansas until the United States Supreme Court should decide the case of *Miller Bros. Co. vs. Maryland*. The Arkansas Court held that the solicitation of orders by the Tennessee Company through its representative in the State of Arkansas, made the Tennessee Company liable to collection from Arkansas purchases of use tax due the State of Arkansas, by reason of the use of merchandise so solicited to Arkansas residents. The Arkansas Court further held that the holding, in the case of *General Trading Company vs. State Tax Commissioner*, 322 U.S. 335, 64 S.C. 1028, 88 L. Ed. 1309, was controlling and that the decision in the *Miller Brothers Company* case had no application. The United States Supreme Court denied certiorari in the case, and refused to review same.

We submit that to require the appellant, Scripto, Inc., to collect Florida Use Tax due the State of Florida on

merchandise sold by Scripto, Inc. to Florida residents and shipped by Scripto, Inc. from its factory in Atlanta for use or consumption in the State of Florida, in no way violates the Commerce Clause or the Due Process Clause of the Federal Constitution.

CONCLUSION

It is our conclusion, therefore, that the holding of the Florida Supreme Court that Scripto, Inc. is a dealer within the contemplation of Chapter 212, Florida Statutes, and that as such it should register in the State of Florida as required by that act and collect and remit to the State of Florida through its Comptroller the Use Tax imposed by the State on the mechanical writing instruments sold to Florida customers by Scripto, Inc., via Adgif, does in no way violate the commerce clause or the due process clause of the Federal Constitution. The Florida Supreme Court was correct in so holding and its decision should be affirmed.

Respectfully submitted,

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Special Assistant Attorney General

PROOF OF SERVICE

I, Richard W. Ervin, Attorney for Dale Carson, Sheriff of Duval County, Florida, and Ray E. Green, as Comptroller of the State of Florida, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of January, 1960, I served copies of the foregoing brief for the appellees on the appellant therein named as follows: on Scripto, Inc., a Georgia corporation, by mailing a copy thereof in a duly addressed envelope with airmail postage prepaid, to Ernest R. Rogers, 1045 Hurt Building, Atlanta 3, Georgia, Attorney of Record for-said appellant.

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